

LA CHARTE  
DES DROITS FONDAMENTAUX  
saisie par  
LES JUGES EN EUROPE

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THE CHARTER  
OF FUNDAMENTAL RIGHTS  
as apprehended by  
JUDGES IN EUROPE

Sous la direction de  
Laurence BURGORGUE-LARSEN

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(IREDIES)

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## AVANT-PROPOS

Etudier le droit de l'Union n'est pas chose aisée. Ce « droit de l'intégration » tel que l'avait théorisé avec brio Pierre Pescatore au début des années 1970, est un droit hors du commun des catégories juridiques classiques, ce qui ne facilite guère son appréhension théorique et pratique. Le développement considérable dont il a fait l'objet depuis plus de soixante-ans, couplé avec la charge idéologique qu'il charrie, ne participent guère à faciliter son étude. La famille des juristes, dans sa grande majorité, s'évertue tant bien que mal à décrypter les jeux complexes qui se nouent au cœur des institutions qui participent à créer ce *droit commun* censé incarner l'intégration des marchés et, au-delà, celle des Etats et des peuples. L'étude du droit de l'Union est en règle générale abordée à partir de cette mécanique où institutions, compétences, objectifs s'entremêlent pour dégager un dénominateur commun minimum. Si le droit de l'Union est un monde à lui seul – ce qui explique qu'il ait besoin de spécialistes pour le décrypter et le diffuser afin de le rendre intelligible – il ne peut pas être déconnecté de ce qui participe à sa création et à sa diffusion : le droit et la politique des Etats membres. Car l'Union, qu'on le veuille ou non, c'est cette étonnante alchimie entre le supranational et le national, entre les institutions européennes et nationales, entre l'ordre juridique de l'Union et celui des Etats. Or, aujourd'hui, cette intime interconnexion n'est toujours pas au cœur des analyses doctrinales majoritaires de « l'idée européenne », pour reprendre la belle formule de Pierre-Henri Teitgen. Ce n'est qu'à l'occasion des crises du processus intégratif que l'approche nationale de l'étude du droit de l'Union se voit relancée avec les nombreux biais qui en découlent. Il y eut pourtant des précurseurs comme le professeur Joël Rideau qui, en France, s'est évertué à prendre au sérieux, tout au long de sa carrière, cet irréductible fait national. Il faut dire que cette approche de l'étude du droit et de la politique d'intégration nécessite de dépasser les cloisonnements disciplinaires (toujours à l'œuvre et particulièrement destructeurs) et d'avoir le goût, l'envie, l'énergie de redécouvrir le droit des Etats sous le prisme européen. Le décroisement disciplinaire est plus que jamais nécessaire à une époque où les approches théoriques sur les rapports de systèmes sont entièrement revisitées.

Le lancement de la collection des « Cahiers européens » en 2011 – avec comme premier numéro *L'identité constitutionnelle saisie par les juges en Europe* – avait justement le souci, de réintégrer la part du « national » dans l'étude du droit de l'Union. Non pas que cette approche entende tomber dans un cloisonnement de plus, en étant exclusive de toute autre manière de penser de façon critique le fait européen, mais entend simplement faire en sorte que le champ national – en ce qu'il fait partie intégrante du champ européen – ne soit pas ignoré des études européennes.

## AVANT-PROPOS

Le dixième numéro de la collection des « Cahiers européens » arrive, ce faisant, à point nommé. L'ouvrage sur *La Charte des droits fondamentaux saisie par les juges en Europe-The EU Charter as apprehended by Judges in Europe*, a été conçu sur la base d'une grille d'analyse imaginée afin d'appréhender toutes les phases et les manières avec laquelle la Charte des droits fondamentaux a pu être « saisie » par les différents acteurs nationaux ; il s'est agi de prendre la mesure, précise, du degré d'effectivité de ce texte dont on sait qu'il a été pensé et rédigé afin d'incarner et de rendre visible les valeurs de l'Union.

Cet ouvrage est le fruit de près de trois ans de recherche collective laquelle fut menée avec des chercheurs et collègues issus de vingt-deux pays membres de l'Union<sup>1</sup>. Qu'ils en soient tous chaleureusement remerciés ; sans leur indéfectible engagement et professionnalisme, cette cartographie constitutionnelle et judiciaire de la Charte au sein des Etats membres n'aurait pas pu voir le jour. Une telle entreprise a nécessité de faire des choix, notamment en termes linguistiques. Plutôt que de laisser au bord du chemin l'étude de nombreux pays, il a été délibérément choisi de publier l'ouvrage en français et en anglais, ce qui est aussi une manière de faire se rencontrer deux mondes académiques, trop souvent claquemurés dans leurs différentes cultures.

Ces quelques lignes ne pouvaient faire l'économie de remerciement appuyés et chaleureux aux membres de l'IRENIES (Aurélien Guillemet et Inès El Hayek) qui, sous l'expertise de Catherine Botoko, ont relu et harmonisé l'intégralité des communications. De même, il est important ici de mentionner le soutien indéfectible de l'Institut et de ses directeurs qui, animés par une vision ambitieuse de la recherche, ont rendu possible la publication de cet ouvrage.

Laurence BURGORGUE-LARSEN,  
*Directeur de la collection*

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<sup>1</sup> Les pays « manquants » n'ont nullement été écartés de façon arbitraire. Leur absence résulte simplement du fait qu'il a été complexe de trouver des chercheurs disponibles issus de ces pays (Croatie, Estonie, Lettonie, Lituanie, Pays-Bas, Slovaquie), pour s'engager entièrement dans ce projet collectif.

## PREFACE

Studying the law of the European Union is not an easy task. This « law of integration », as Pierre Pescatore theorized it at the early 1970s, is a particular law, different from classical legal categories, which does not help researchers to understand it theoretically and practically. Its significant development since more than sixty years, coupled with the ideological charge it entails, does not make studying it easier either. The lawyers' community, in their majority, is struggling to decrypt the complex interactions appearing within the institutions that participate in the creation of a common law which is intended to embody the market integration and beyond that, the integration of States and peoples. The study of the law of the European Union is generally addressed from the perspective of the close interconnection between institutions, competences and objectives to identify the lowest common denominator. Whereas the law of the Union is just a world of its own – which explains the need for specialists to interpret and diffuse it so as to make it understandable – it cannot be disconnected from the factors that contribute to its creation and diffusion: the law and politics of the member States. The European Union is, whether we like it or not, an astonishing alchemy between the supranational and national levels, European and national institutions, the Union's and the member States' legal order. However, this intimate interconnection is still not at the centre of the dominant doctrinal analyses of the « European idea » – to cite the great formula of Pierre-Henri Teitgen. The national approach of the study of the European Union's law is re-launched only at the time of the integration's crises, with many biases resulting from it. There were some early pioneers such as Professor Joël Rideau in France who during his entire career was striving to take seriously this irreducible national aspect that is the law and politics of the member States. One has to add that this research approach of the European Union's law and politics requires overstepping the (still operating and particularly destructive) disciplinary boundaries and having the desire, the motivation and the energy to rediscover the States' law through a European prism. The cross-disciplinary approach is more necessary than ever at a time when theoretical approaches about the relationships between systems should be entirely revisited.

The launch of the collection « Cahiers européens » in 2011 – with its first number on *The constitutional identity as apprehended by the judges in Europe* [*L'identité constitutionnelle saisie par les juges en Europe*] – was intended to reintegrate the “national” aspect to the research of the Union. This approach is not aimed to strengthen even more the disciplinary boundaries, which would exclude any other ways of critically analysing the European integration, but it is intended to ensure that the national agenda, constituting integral part of the European agenda, is not ignored in the European studies.

## PREFACE

The tenth number of the collection « Cahiers européens » appears just at the right time. The book on the *Charter of Fundamental Rights as apprehended by Judges in Europe* [*La Charte des droits fondamentaux saisie par les juges en Europe*] was elaborated on the basis of an analytical framework to assess all the phases and means in which the Charter of Fundamental Rights could be « apprehended » by different national stakeholders; the research aimed to measure to what extent the Charter is effective, while bearing in mind that the instrument has been conceived and drafted in order to enshrine and make visible the European Union's values.

This book is the result of almost three years of collective research; it has been conducted with researchers and colleagues from twenty-two member States of the European Union<sup>1</sup>. I warmly thank them for their work; without their unwavering commitment and professionalism, the creation of the present political and judicial map of the Charter would not have been possible. Such an undertaking required to make choices, first of all as to the language. Rather than leaving the research of several member States aside<sup>2</sup>, it has been deliberately decided to publish the book both in French and English, which also enables the cooperation between the two academic worlds, very often confined to their separate culture.

I cannot conclude my short lines without expressing my wholehearted and warm word of thanks to the members of the IREDIES (Aurélien Guillemet and Inès El Hayek) who, with the expertise of Catherine Botoko, reviewed and harmonized the entirety of the chapters. Similarly, I must emphasize the generous support of the Institut and its directors who, guided by an ambitious research vision, made this publication possible.

Laurence BURGORGUE-LARSEN,  
*Director of the collection*

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<sup>1</sup> The « lacking » countries were not arbitrarily set aside. Their absence results from the difficulties to identify and find researchers from those countries (Croatia, Estonia, Latvia, Lithuania, the Netherlands, Slovakia) available for fully collaborating in this research project.

<sup>2</sup> With regard to the often prohibitive costs that the translation from English to French required.

# CYPRUS

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## I. THE FORMAL STATUS OF THE CHARTER AND ITS ROLE IN THE PREPARATION OF NATIONAL LEGISLATION

### I.1. The formal status of the Charter

*I.1.a. Does the Constitution contain a reference to international or European human rights instruments? If the Constitution has been recently amended or is a new Constitution, does it explicitly refer to the Charter?*

#### I.1.a.i. Constitutional background

The Constitutional background in Cyprus differs from the rest of the Member States. The Cypriot Constitution was drafted and compiled in 1960 and Cyprus was declared an independent country. The Cypriot Constitution is often described as a lengthy, rigid and detailed Constitution. It is designed to protect bi-communalism and offers a system of multiple checks ensuring in this way that both communities participate in the government and both remain protected. Another important characteristic of the Constitution is the principle of separation of powers, which has often been considered as one of the most significant tools for maintaining the system of checks and balances enshrined in the Constitution of Cyprus<sup>1</sup>. The three powers of the State recognised by the Constitution are the Executive, the Legislature and the Judiciary and the principle prohibits to one power to intervene in the field of the exclusive competence of the other authority.

Despite the importance of the principle of Separation of Powers for the Republic of Cyprus, the principle is not explicitly mentioned in the Constitution but several constitutional provisions confirm that the Constitution embodies such

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\* Jean Monnet Module Leader and Academic Coordinator, “The Law of Financial and Economic Governance in the EU” (FEcoGov), 2014-17, School of Law, UCLan, Cyprus.

<sup>1</sup> A. C. EMILIANIDES, “Cyprus”, in A. ALEN and D. HALJAN (eds.), *International Encyclopaedia of Laws: Constitutional Law*. Alphen aan den Rijn, Kluwer Law International, 2013, p. 55.



principle along with the settled case-law of the Supreme Court. Such provisions are Article 46-49 and 54 which vest executive powers in the President of the Republic, or the Council of Ministers, Article 61 which vests legislative power in the House of Representatives and Article 133-164 which vest judicial power in the Supreme Court (formerly Supreme Constitutional Court and High Court) and its Subordinate courts<sup>2</sup>. The Cypriot Constitution interestingly includes certain exceptions to the strict application of the principle. Namely, the Council of Ministers may undertake preparatory legislative acts by drafting bills before they are introduced to the House of Representatives by a particular Minister in accordance with Article 54(f) of the Constitution; the Minister of Finance may submit the budget (Article 167 of the Constitution); Article 79(2) grants Ministers the right to follow the proceedings of the House of Representatives and to make statements to the House of Representatives; and Article 54(g) authorises the Council of Ministers to issue subsidiary legislation in some circumstances<sup>3</sup>. The Supreme Court has constantly ruled that, if a law is contrary or inconsistent with the principle of separation of powers, it is rendered unconstitutional; a recent illustration of the power struggle between the executive and the legislative branches of government regarding shopping hours on the island is included in this Report. The full independence of the judiciary will also be emphasised in this Report.

Since 1964, after the withdrawal of the Turkish Cypriot community from the Government, the Constitution must be read in the light of the doctrine of necessity, which offers the pillar on which the Constitution relies for its preservation. For instance, executive powers jointly dedicated to both the President and the Vice President of the Republic (Greek Cypriot and Turkish Cypriot respectively), can now be exercised by the President alone in the light of the doctrine of necessity. This also affected the exercise of the legislative and judiciary branches of government.

Originally, the Supreme Court exercised the first instance jurisdiction as a Supreme Constitutional Court. Pursuant to Article 144 of the Constitution the Supreme Court has exclusive jurisdiction to decide on the constitutionality of any law of the Republic and to resolve conflicts of powers or responsibilities between the different instruments of the State. Therefore, whenever such question was raised before a court, the latter should have reserved the question for the decision of the Supreme Court and stay further proceedings until such question is determined by the Supreme Court. The events of 1964 however resulted in the introduction of a law (Law 33/64) adopted by the House of Representatives in the absence of Turkish Cypriot members which created a new Supreme Court and merged the jurisdictions of the constitutionally provided Supreme Constitutional Court and the High Court<sup>4</sup>. As a result, Article 144 was

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<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> C. KOMBOS, A. PANTAZI, "A Human Rights post Lisbon-Cypriot Report", in J. LAFFRANQUE (ed.), *The protection of fundamental rights post-Lisbon: the interaction between the Charter of*

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no longer applicable. Therefore, since 1964 any court in the Republic has jurisdiction to hear questions on the constitutionality of laws without having to resort to the procedure provided for in Article 144 of the Constitution, or having to refer the question to the Supreme (Constitutional) Court<sup>5</sup>. The Supreme Court only has exclusive jurisdiction in relation to the constitutionality of family law affairs and also decides on the constitutionality of laws in connection with which the President of the Republic exercises the right for referral, granted to him under the Constitution, as will be developed in this Report.

The Supreme Court until now has therefore exercised its powers in three different jurisdictions which will be distinguished and analysed in this Report. First of all, the Supreme Court exercises the second instance jurisdiction as a Court of Appeal. Namely, the Supreme Court hears all appeals on decisions of first instance courts, which exercise jurisdiction in civil and criminal matters. As a rule, appeals are heard by three judges. The hearing of an appeal is based on the records of proceedings at first instance (except in very exceptional cases where there is the opportunity for a testimony to be heard). When exercising its appellate jurisdiction the Supreme Court may confirm, differentiate or set aside the contested decision or order the retrial of the case<sup>6</sup>. Secondly – and this until recently – the Supreme Court has exercised the revisional jurisdiction (judicial review), meaning that it held until recently the exclusive jurisdiction to hear applications in relation to the review of the legality of acts, decisions and omissions of any body, authority or person exercising executive or administrative authority. Judicial review is exercised on application by a person complaining that an existing legitimate interest of the applicant is adversely and directly affected. The application has to be made when the matter comes to the applicant's knowledge<sup>7</sup>. The Supreme Court could annul until recently any enforceable administrative act that was adopted in breach or in excess of authority or contrary to the law or the Constitution.

A new amendment to the Constitution was introduced in July 2015<sup>8</sup>, which changed the structure of the Supreme Court by establishing Administrative Courts in Cyprus, allegedly in order to help the Supreme Court to decongest from the workload and award justice faster. The Law amended paragraphs 1, 4, 5 and 6 of Article 146 and added paragraphs 1A, 4(d) and 5A to Article 146 of the Constitution, in order to transfer the first instance jurisdiction of the Supreme Court under Article 146, to the newly established Administrative Court, to be exercised exclusively by the latter. The Administrative Court started operations in January 2016. The amending Constitutional Law was also a transposing

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*Fundamental Rights of the European Union, the European Convention on Human Rights and national constitutions*, Tallinn, Tartu University Press, 2012, p. 308.

<sup>5</sup> A. C. EMILIANIDES, "Cyprus", in A. ALEN, D. HALJAN, *International Encyclopaedia of Laws: Constitutional Law*, Alphen aan den Rijn, Kluwer Law International, 2013.

<sup>6</sup> [http://www.supremecourt.gov.cy/judicial/sc.nsf/DMLSCourt\\_gr/DMLSCourt\\_gr?OpenDocument](http://www.supremecourt.gov.cy/judicial/sc.nsf/DMLSCourt_gr/DMLSCourt_gr?OpenDocument).

<sup>7</sup> [http://ec.europa.eu/civiljustice/org\\_justice/org\\_justice\\_cyp\\_en.htm#6](http://ec.europa.eu/civiljustice/org_justice/org_justice_cyp_en.htm#6).

<sup>8</sup> Law of the Eighth Amendment of the Constitution 2015 (130(I)/2015).

measure for paragraphs 1, 2 and 4 of Article 46 of Directive 2013/32/EU<sup>9</sup>, paragraph 1 of Article 26 of Directive 2013/33/EU<sup>10</sup> as well as paragraph 1 of Article 27 of Regulation (EU) n° 604/2013<sup>11</sup>.

The legislator however, not only removed the exclusive competence of the Supreme Court in cases of administrative law at first instance, but also made the Supreme Court a Court of Appeal only on legal grounds, as appointed by the new Law on the Establishment and Operation of the Administrative Court 2015 (Law 131(I)/2015). Therefore the entry into operations of the new Court is deemed to constitute a significant variation in the award of administrative justice in Cyprus, which according to the Constitution was defined as an exclusive competence of the Supreme Constitutional Court. Instead of a solution deriving from the separation of the Supreme Court into the respective two Courts as provided by the Constitution itself, the adoption of an amending law creating the new Administrative Court was preferred, potentially having an impact also on the legal reasoning of the Supreme Court which would be expected in gain in substance and depth. Most importantly however, some doubts have been expressed as to the legitimacy of the Administrative Court itself leading in particular to the availability of an effective judicial remedy in administrative matters in Cyprus, to the extent that the review of the legality of a controlled act or omission by the administration, to be undertaken by the Administrative Court, has been severed from the review of the substance of the matter, which remains under the jurisdiction of the Supreme Court<sup>12</sup>.

By way of summary and conclusion for this part, it can be said that after the withdrawal of the Turkish Cypriot community from the government, the doctrine of necessity became and remains the cornerstone of the legal order with the decision in *Mustafa Ibrahim*<sup>13</sup>, which established that under specific terms and requirements, exceptional departures from the constitutional provisions could be approved, when compliance with them was rendered impossible owing to the withdrawal of the Turkish Cypriot community. Despite this rather extraordinary constitutional setting, the protection of fundamental rights has remained largely unaffected, as will be seen in this Report.

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<sup>9</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, *OJ L* 180, 29.6.2013.

<sup>10</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, *OJ L* 180, 29.6.2013.

<sup>11</sup> Regulation (EU) n° 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, *OJ L* 180, 29.6.2013.

<sup>12</sup> The Administrative Court will however get involved in the substance of the matter in asylum and tax cases, so as to release the Supreme Court's workload in these two areas. It is to be hoped that the list of areas where the Court will be involved in substance will grow in the near future.

<sup>13</sup> *The A-G of the Republic v. Mustafa Ibrahim* [1964] CLR 195.

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### I.1.a.ii. The protection of fundamental rights in the Cypriot constitutional framework

Within the framework as set out above, the Cypriot Constitution does not include any direct reference to the Charter of Fundamental Rights or to any other international law instrument protecting fundamental rights such as the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (hereunder “ECHR”). However, it is obvious that, regarding the field of human rights, its authors had the European Convention of Human Rights as a standard when they drafted the Constitution. The fundamental rights mentioned in Part II of the Constitution (Articles 6-35) clearly correspond to the rights established in the Convention.

The status and origins of the constitutional provisions on fundamental rights can be found in Article 56 (now) ECHR, which allows a State to extend the Convention to all or any of the territories for whose international relations it is responsible. The colonial power, the United Kingdom, made such a statement in relation to Cyprus, before its independence, in 1953. Moreover, the London Agreement provided for the formation of a Joint Commission in Cyprus responsible for finalizing the document of the Constitution as defined in the Constitutional framework. The framework for the Constitution in relation to human rights was clearly defined in the Treaty of Establishment, where Article 5 provided that: “[t]he Republic of Cyprus shall secure to everyone within its jurisdiction human rights and fundamental freedoms comparable to those set out in section I of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on the 4th of November, 1950, and the Protocol to that Convention signed at Paris on the 20th of March”<sup>14</sup>. Therefore, the Constitution of Cyprus is until today modelled on the ECHR, even though the Convention does not prevail over the Constitution.

Moreover, according to Article 169(3) of the Constitution, in order for international law instruments, i.e. treaties, conventions or agreements, to enjoy superior force over municipal law, they need to comply with the condition of reciprocity; namely, to be also applied by the other party thereto. However, in the case of *Malactou v. Armefti*<sup>15</sup> the Supreme Court had observed that there are certain international treaties and conventions for which, owing to their nature, the condition of reciprocity is not applicable. These are multilateral conventions relating *inter alia* to the protection of human rights, or whose aim is the improvement and formulation of common rules and the achievement of social justice<sup>16</sup>. Similarly, the European Convention on Human Rights and its Protocols

<sup>14</sup> C. KOMBOS and A. PANTAZI, “A Human Rights post Lisbon-Cypriot Report”, in J. LAFFRANQUE (eds.), *The protection of fundamental rights post-Lisbon: the interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and national constitutions*, Tallinn, Tartu University Press, 2012, p. 310.

<sup>15</sup> *Malactou v. Armefti and Another* [1987] 1 CLR 207.

<sup>16</sup> A. C. EMILIANIDES, “Cyprus”, in A. ALEN and D. HALJAN, *International Encyclopaedia of Laws: Constitutional Law*, Alphen aan den Rijn: Kluwer Law International, 2013.

has, on the basis of the aforesaid Article 169(3) of the Constitution, superior force to any municipal law, either antecedent or subsequent to their ratification by law and the condition of reciprocity is deemed not applicable<sup>17</sup>. However, multilateral conventions such as the ECHR only prevail over municipal law and not over the Constitution. The Constitution, as the supreme law of the Republic, does not fall within the definition of municipal law of Article 169 and thus the Constitution is superior to the ECHR.

After the accession of Cyprus to the EU, the Fifth Amendment to the Constitution (127(I)/2006) was drafted and adopted, thereby adding Article 1A to the Constitution and incorporating EU law into the Constitution and Cypriot law. An explicit – although perhaps not entirely clear – reference to the relationship of the Constitution with EU law was established. Specifically, Article 1A states that:

“[n]o provision of this Constitution shall be considered as invalidating laws enacted, acts done or measures adopted by the Republic necessitated by its obligations as a Member State of the European Union or shall prevent Regulations, Directives or other acts or binding measures of a legislative character adopted by the European Union or by the European Communities or by their institutions or by their competent bodies under the provisions of the treaties founding the European Communities or the European Union, from having legal effect in the Republic”<sup>18</sup>.

Therefore, it appears that the wording of the said Article allows EU law to prevail over the Constitution when a conflict between them occurs, giving effect to the principle of primacy of EU law<sup>19</sup>. Consequently, bearing in mind that the Charter entered into force with the Lisbon Treaty and now forms integral part of EU law, having the same legal value as the European Union Treaties, it can be assumed that the Charter is also incorporated into the Cypriot law through the addition of Article 1A of the Constitution.

The Fifth Amendment to the Constitution also altered some of the non-basic constitutional provisions, namely Articles 11, 169, 140 and 179, so as to allegedly bring them in line with Article 1A<sup>20</sup>. Article 140 of the Constitution establishes the “Preventive Control” of constitutionality of laws or decisions of the House of Representatives, prior to their promulgation<sup>21</sup>. The Preventive Control under Article 140, as amended, provides that

<sup>17</sup> *Ibid*, p. 35.

<sup>18</sup> C. KOMBOS, S. LAULHÉ SHAELOU, “The Cypriot Constitution under the impact of EU law: an asymmetrical formation”, in A. ALBI (ed.), *The Role of national Constitution in European and global governance*, TMC Asser Press, 2016, (forthcoming) (Translation by the authors).

<sup>19</sup> *Ibid*, sections 1.2 and 2.1.

<sup>20</sup> For Article 11 of the Constitution, see C. KOMBOS, S. LAULHE SHAELOU, “The Cypriot Constitution under the impact of EU law: an asymmetrical formation”, in A. ALBI (ed.), *The Role of national Constitution in European and global governance*, TMC Asser Press, 2016 (forthcoming), section 2.3.

<sup>21</sup> *Ibid*, section 1.2.

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“the President and the Vice President of the Republic together, prior to the promulgation of any law or decision of the House of Representatives, are entitled to refer to the Supreme Constitutional Court to give its opinion on whether such law or decision or specified provision thereof is repugnant to or inconsistent with any provision of the Constitution... *or is repugnant to or inconsistent with the law of European Communities or of the European Union*” (emphasis added).

It should be recalled that due to the withdrawal of the Turkish Community from the Government, as explained above, and according to the law of necessity, Article 140 can be exclusively exercised by the President of the Republic of Cyprus.

The power of Preventive Control, under Article 140, was thus expanded with the Fifth Amendment of the Constitution, so that the President can now use this power to refer to the Supreme Court any question regarding the compatibility of a law or decision of the House of Representatives with the “law of the European Communities or of the European Union”. Consequently, the Supreme Court can after a reference by the President examine the compatibility of a law with the legal obligations of Cyprus as a Member State of the EU, at a stage prior to the entry into force of the law<sup>22</sup>. This Preventive Control of the validity of a provision in terms of its compatibility with EU law is of crucial importance, bearing in mind that EU law includes the obligations of Cyprus under the Charter as well.

Practical considerations of the use of Article 140 of the Constitution with respect to the protection of fundamental rights, including under EU law

A recent example of the use of Article 140 is the reference by the President to the Supreme Court regarding the Law on the Regulation of the Operations of Shops and the Conditions of Employment of their Employees (Amending) (n° 4) of 2015, amending the 2006 basic Law with the same name<sup>23</sup>. Some background to the reference is necessary. The consideration of the regulation of shopping hours and related conditions of employment in Cyprus started well before Cyprus’ EU accession and has since then been ongoing up to today. At the time of writing of this Report, there is still no final outcome on the matter as the power struggle continues between the executive and legislative branches of government respectively, whereas the judiciary has clearly signalled the end of the struggle through its application of the principle of separation of powers to the matter. On two occasions prior to EU membership, the Supreme Court had considered whether the legal framework regulating the operation of shops (then closed on Wednesday, Saturday afternoon and Sunday) and the working hours (and days) of shop assistants was contrary to Article 25(1) of the Constitution. It was held in a first decision by the majority of the Supreme Court that this was

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<sup>22</sup> C. KOMBOS, *The Impact of EU law on Cypriot Public Law*, Sakkoulas Publications, 2015, p. 86.

<sup>23</sup> Reference 1/2015, *President of the Republic v. House of Representatives*, 3 December 2015.

not the case as these were matters of immediate public interest<sup>24</sup>. Subsequently, on appeal<sup>25</sup>, when considering the differentiated regime put in place in the touristic areas, the case of *Georgiou et al v. the Police* was upheld by a majority of the Supreme Court whereas in the dissenting judgment, the second purpose of the law, i.e. fair competition, in addition to the protection of workers, was said to be breached since shops in touristic areas are not subject to the same restrictions<sup>26</sup>. Post EU accession, it appears that the rationale developed in such decisions remains largely unchanged, with considerations in Cyprus underlying the regulation of shopping days/hours and related working conditions determined more on the basis of the economic situation of the island and Cyprus's internal structure rather than with reference to the application of EU law and of the Charter in particular, such as the right to work or to conduct a business.

By virtue of Article 27 of the 2006 Law, the task to regulate such days and hours for touristic shops was entrusted to the Minister of Labour and subsequently to the Council of Ministers following an amendment to the Law in March 2015. From the taking of successive orders (*diatagmata*) by the Minister of Labour to regulate touristic areas, touristic seasons as well as shopping hours, Regulations (*Kanonismoi*) are now issued by the Council of Ministers, with the expectation on the side of the House of Representatives that it will exercise control over such Regulations (the entry into force of the amending Law was deferred until early and then mid-May 2015). The Council of Ministers had proceeded in April 2015 with the issue of Regulations which were tabled before and rejected by the House of Representatives on 7 May 2015. On the same day, the House of Representatives passed the Law on the Regulation of the Operations of Shops and the Conditions of Employment of their Employees (Amending) (n° 4) of 2015, a new amendment to the 2006 Law, transferring the regulatory powers altogether to the House of Representatives and making other material amendments to the 2006 Law (see below). This amending Law remains however to be promulgated by the President of the Republic. The President exercised in late May 2015 his right of reference to the Supreme Court under Article 140 of the Constitution as the amending Law appeared to breach the right to work and of free enterprise as well as the principle of non-discrimination under the Constitution and EU law<sup>27</sup>. In the meantime, just before the entry into force of the March amending Law, the Minister of Labour proceeded with the issue of orders covering the period May-November 2015.

<sup>24</sup> *Georgoulla Georgiou et al v. the Police* [1999] 2 CLR 616. Judge Hadjihambis was however of the opinion that the setting of a second half day-off during the week was contrary to Article 25(1) of the Constitution and could not be justified under Article 25(2), for the reason that the public interest must be examined in context and not in general terms (which was not the case with the specific law at stake).

<sup>25</sup> *Andronikos Vasiliadies Ltd et al v. the Police* (2001) 2 CLR 715.

<sup>26</sup> Judge Hadjihambis, *ibid*.

<sup>27</sup> Reference 1/2015, *President of the Republic v. House of Representatives*, 3 December 2015. There was also a second reference (Reference 2/2015, *President of the Republic v. House of Representatives*, 3 December 2015) under Article 141 of the Constitution (restriction to the right to work in the public interest).

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In its reference to the Supreme Court under Article 140, the President argued that the said Law is contrary and inconsistent with Articles 3, 25, 27 and 35 of the Constitution of the Republic<sup>28</sup>, with the principle of separation of powers from which the Constitution of the Republic is pervaded and with Article 18 of the TFEU. Unfortunately, the Full Bench of the Supreme Court focused its opinion and its attention on the issue of the alleged violation of the principle of separation of powers with no references to the alleged violations of constitutional provisions or to EU law. This could appear as yet another example of a case where a law may violate specific fundamental rights potentially included in the Charter but still, the long-established rights under the Constitution are preferred and the reference to EU law is aborted. The Supreme Court ruled in full chamber that the Law, as a whole, is contrary to the principle of separation of powers and it is therefore unconstitutional. Specifically, the Supreme Court addressed the question of whether the regulation of the shop opening hours, during the period of Monday to Saturday and Sunday, throughout the winter and summer period, the definition of the tourist areas/zones and the creation of special arrangements for particular stores (sale of souvenir items, Cypriot crafting, goldsmithing and silversmithing, and convenience stores or “mini markets”), fall within the exclusive competence of the executive power to the extent that it contains administrative operation data, or whether it falls under the overall authority of the House of Representatives as the legislative power to make laws “in every issue” pursuant to Article 61 of the Constitution. The essence of the matter for the Court is to what extent this act introduces an essential rule of law in a general and abstract manner, for which the House of Representatives is responsible, or whether the act constitutes a regulatory administrative operation for specific cases, for which the administration is responsible. In line with the above legal issue, the Court came to the conclusion that the regulation of shops opening hours, the setting of boundaries of tourist areas/zones and the creation of special arrangements for some shops, all fall within the exclusive competence of the executive power and constitute, essentially, regulation of an administrative nature.

Despite the annulment of the amending Law of 7 May 2015 by the Supreme Court on 3 December 2015, the House of Representatives proceeded on 10 December 2015 with the cancellation of the latest Regulations issued by the Council of Ministers in late November 2015, and tabled before the House of Representatives in accordance with the said amending Law one day *before* the decision of the Supreme Court, but discussed by the legislative power *after* the decision of the Supreme Court. On 31 December 2015, the President of the Republic together with the Council of Ministers filed a recourse to the Supreme Court under Article 139 of the Constitution (conflict of powers) against the House of Representatives, asking the Supreme Court to confirm the validity of the said Regulations as administrative acts falling within the exclusive jurisdiction of the executive power and the legitimacy of their publication in the

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<sup>28</sup> Article 25 is the right to work, Article 27 is the right to strike and Article 35 is the right to effective application of the law.



Official Gazette despite the decision of the House of Representatives, which must be found void<sup>29</sup>. The essence of the matter was for the Supreme Court to decide whether the House of Representatives had the right to adopt, amend or reject the Regulations. In its majority ruling, the Supreme Court rejected the recourse on the ground that it was time barred without getting into the merit of the case. Dissenting judgments developed however some points of law, of essence to the principle of the separation of powers in Cyprus but beyond the scope of this Report to the extent that none of the points discussed the relevance of the EU Charter in this context.

By way of epilogue, it should be noted that since the change of government in March 2013, all shops and not just those located in touristic areas had benefited from a relaxation of the regulation on shopping days/hours and related working conditions, which triggered so much debate within the House of Representatives, with respect in particular to general shops opening on Sundays. It is also to be noted that the Reference 1/2015 of the Supreme Court, despite relating to the special legal framework put in place to regulate touristic shops under Article 27 of the 2006 Law (as amended), also considered the general legal framework regulating the operations of shops and related-working conditions as set out in the 2006 Law, to the extent that the May 2015 Law under scrutiny also amended Article 20 of the 2006 Law. Article 20 of the 2006 Law regulates the opening hours of general shops during the winter season, prohibiting their opening on Sundays and again, it derives from the Reference that the operations of general shops fall within the exclusive jurisdiction of the administration and not under the one of the legislative through a general law. Following the Reference and the Christmas festive season where shops are allowed to open including on Sundays, some general shops decided to remain open in early January, leading to the prosecution of one supermarket chain by the Director of the Department of Labour Relations before the District Court of Nicosia by virtue of Article 20 of the 2006 Law<sup>30</sup>. The accused, accepting the charges and exercising their right to silence, were acquitted by the judge who considered the constitutionality of the said provision of the Law in the light of the Supreme Court's Reference (consideration of the principle of separation of powers only), and found the specific provisions of Article 20 of the 2006 Law unconstitutional. It is to be regretted however that this exercise of judicial review did not extend to Article 25 of the Constitution, as requested by the accused, which would also have been an occasion for the judge to consider the corresponding provisions of the EU Charter.

Continuing with key amendments to the Constitution following EU accession, the Fifth Amendment also added a new paragraph, paragraph 4, to Article 169. Paragraph 4 now provides that: “[t]he Republic may exercise every choice and discretion provided for in the Union and in any Treaties which amend or replace

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<sup>29</sup> Case 1695/2015, *President of the Republic, Council of Ministers v. House of Representatives*, 28 March 2016.

<sup>30</sup> Case 4652/16, *Director of the Department of Labour Relations v. Papaellinas et al*, 18 March 2016.

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the above and which are concluded in the Republic”. Lycourgos explained the rationale of the amendment by stating that “the aim of this provision is to allow the Republic to exercise freely all options that it has as a Member State, without being limited by the fact that an option may be incompatible with its Constitution”<sup>31</sup>. Such participation would have been impossible only with the amendment of Article 1A, given that the said Article allows the Republic to comply with all its obligations, while participation in enhanced cooperation for example, depends on every Member State’s choice, and thus does not constitute an obligation<sup>32</sup>. Another significant amendment is that of Article 179 which, post-amendment, incorporates, within the supreme law of the Republic, the obligations imposed on the Republic as a result of its participation as an EU Member State. In other words Union law, including the case law and any other EU obligation, prevails over any inconsistent law or decision of the House of Representatives or any other organ, authority or person of the Republic exercising executive power or administrative function and over the Constitution as well. As Lycourgos puts it

“the combined effect of the new Article 1A and of Article 179 as amended, is that not only Community law but also EU law has been recognised as taking precedence over the Constitution.”

He further explains

“[i]n that respect, the principle enshrined in the Constitution of the Republic of Cyprus preceded even the case law of the Court of Justice of the EU (hereunder “ECJ”), which never expressly held that the acts adopted under the Union’s third pillar had precedence over national constitutional provisions”<sup>33</sup>.

Even if following the entry into force of the Treaty of Lisbon, the issue becomes obsolete, it is nevertheless quite interesting to see how the Republic of Cyprus gave greater effect to the principle of supremacy than required, through its Constitution.

Thus, following the Fifth Amendment to the Constitution and the Supreme Court’s decision of *Attorney General v Costas Constantinou*<sup>34</sup>, it would appear that the hierarchical rule resulting from Article 179 does not apply to EU law, which takes precedence over conflicting constitutional provisions<sup>35</sup>. What is

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<sup>31</sup> C. LYCOURGOS, “Cyprus Public Law as affected by accession to the EU”, in C. KOMBOS (ed.), *Studies in European Public Law*, Sakoulas, 2010, p. 101.

<sup>32</sup> *Ibid.*

<sup>33</sup> C. LYCOURGOS, “Cyprus Public Law as affected by accession to the EU”, in C. KOMBOS (ed.), *Studies in European Public Law*, Sakoulas, 2010, p. 105.

<sup>34</sup> Civil Appeal n° 294/3005, *Attorney General v. Costas Constantinou*.

<sup>35</sup> This may be the subject of some academic debate in Cyprus. A.C. EMILIANIDES argues that EU and EC law are considered as an integral part of the Constitution (2013) p. 54; *contra* C. KOMBOS. PANTAZI (2012) p. 309: “the hierarchical rule resulting from Article 179 does not apply to EU law”; see also C. LYCOURGOS, *op. cit.*, p. 101. For a detailed analysis, see also S. LAULHÉ SHAELOU “Back to reality: The implications of EU membership in the constitutional legal order of Cyprus”, in A. LAZOWSKI (ed.), *Brave new world: application of EU law in the new*

interesting is that, since the Fifth Amendment, the EU Charter on Fundamental Rights gets in theory a higher status than the ECHR, considering that the Convention only takes precedence over conflicting national law but not over conflicting constitutional provisions as stated in Article 179.

In conclusion, the Cypriot Constitution is drafted based on the standards of the ECHR, for the reasons explained above, and provides a satisfactory protection to fundamental rights of Cypriot citizens, yet no explicit reference to the Charter is made. However, due to the fact that firstly, the Charter now has the same legal status as the EU Treaties and secondly, EU law is prevailing over the Constitution and municipal law, it appears that sufficient effective could be provided under the Charter as well. It would appear therefore that following the Fifth Amendment and through the practice of the various mechanisms discussed above, protection under the Charter could be directly provided to Cypriot citizens through the Constitution, even in the absence of an explicit reference to the Charter itself.

*1.1.b. Does any piece of national legislation refer to the Charter?*

Since the Lisbon Treaty came into force and the legal status of the Charter changed, references to as well as reliance on the Charter in instruments of EU law or case law of the European Courts have increased dramatically. It would therefore be expected to witness a similar phenomenon in Cypriot Legislation as well as in case law. This is not the case in Cyprus.

According to our empirical research data<sup>36</sup>, only one piece of legislation makes direct reference to the Charter, namely the Safeguarding and Protection of the Rights of Patients of 2004 (1(I)2005). The Preamble of the said Law states that

“because the protection of the rights of patients derives from International and European Conventions and other legal acts and, especially, from different International treaties ratified by the Republic of Cyprus, from the Declaration on the Promotion of Patients’ Rights in Europe of the World Health Organisation and from the Charter of Fundamental Rights of the European Union... The House of Representatives votes as follows...”.

From the wording of the Preamble it is clear that the said Law was drafted in accordance with the Rights and Principles included in the Charter. Article 3 of the Law which states the aim of the current Law explicitly mentions that:

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*member states*, T.M.C. Asser Press, The Hague, 2010, p. 139 who concludes: “The legislative objective of removing the potential conflict between EC/EU law and the Constitution appears *a priori* achieved; it will however no doubt face the judicial scrutiny of the Cypriot courts through cases on the enforcement of Community law rights in Cyprus”. See also C. KOMBOS, S. LAULHE SHAELOU, “The Cypriot Constitution under the impact of EU law: an asymmetrical formation”, in A. ALBI (ed.), *The Role of national Constitution in European and global governance*, TMC Asser Press, 2016 (forthcoming).

<sup>36</sup> Methodology: In our empirical research we used the legislation databases of Leginet and Cylaw, as well as the minutes of the plenary sitting of the House of Representatives. These sources are not available in English.

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“[t]he provisions of this Law are complementary to the rights deriving from international conventions concerning the protection of human rights, which the Republic has ratified and rights deriving from other laws which contain specific arrangements concerning specific human rights”.

In addition, very recently, in a short session on the 15<sup>th</sup> October 2015, the House of Representatives voted the Law of Legal Aid (Amending) (n° 2) of 2015, according to which the Cypriot legislation is partly complying with the third paragraph of Article 47 of the EU Charter of Fundamental Rights. According to the Report of the Parliamentary Committee on Legal Affairs, Article 47 of the Charter becomes applicable in cases where a person claims before the court that his rights and freedoms were violated, which among others are guaranteed under the Citizenship Rights Directive. This said new Law 173(I)/2015, which amended the Law of Legal Aid of 2002 (Law 165(I)/2002), provides under certain conditions, the right to free legal assistance and representation for a Union citizen or a family member, to bring proceedings under Article 146 of the Constitution, against a decision of the competent authority issued under the provisions of Articles 28 and 33 of the Law of the Right of Union Citizens and their Family Members to Move and Reside Freely with the Republic (Law 7 (I)/2007) (transposing the Citizenship Rights Directive). Law 7(I)/2007 also imposes restrictions on the exercise of the rights of the applicant for entry, residence and free movement within the Republic, for reasons of public policy, public security, public health or for other reasons. The new Law also provides a right to legal assistance for recourse against an adverse decision taken by the competent authority and relating to the said person on grounds of public policy, public security or public health or for other reasons. According to the provisions of the said Law, the abovementioned right to legal assistance is exercised subject to the financial hardship of the applicant, as well as the alleged issuance of a positive decision in favour of the applicant, in the context of the proceedings<sup>37</sup>.

The reason for the lack of reference to the EU Charter in Cypriot legislation could be attributed to the fact that the Charter applies in Cyprus, without any further legislative action needed. Nonetheless, according to the very recent amendment to the Law of Legal Aid of 2002 implementing the third paragraph of Article 47, it would appear that the Cypriot legislator prefers to “nationalise” the provisions of the Charter in accordance with the national legal system, so as perhaps to facilitate their use by national judges. This is due to the fact that, as will be examined again below, national judges tend to prefer the use of national and constitutional law than the provisions of the Charter directly.

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<sup>37</sup> <http://www.livenews.com.cy/cgibin/hweb?-A=106168&-V=news>.

## I.2. The Charter's role in democratic deliberations

*Are questions related to the Charter addressed during parliamentary debates? In the event of the existence of an obligation to consider the Charter, is this obligation sanctioned by judiciary supervision?*

As we ascertained in the previous sections, reference to the Charter is stagnated at very low percentages. In Cyprus failure of the Parliament to refer the Charter when discussing bills which fall within its scope or within the general scope of EU law cannot be controlled by the Cypriot Courts. There is however the Preventive Control under Article 140 of the Constitution. As discussed in previous sections, under Article 140, as applied after 1964, the President of the Republic may refer to the Supreme Court a question in relation to the constitutionality of any law or decision of the House of Representatives prior to their issuance. The Supreme Court should deliver its opinion on whether such law or decision is repugnant to, or inconsistent with, any provision of the Constitution or of EU law. After the Fifth Amendment of the Constitution, the power of Preventive Control was expanded so as to include European Union Law within Article 140 and allow the President to use this power to refer to the Supreme Court any question regarding the compatibility of any law or decision of the House of Representatives with the “law of the European Communities or of the European Union”, prior to the entry into force of the law. Consequently, after a reference by the President of the Republic, the Supreme Court can examine the compatibility of a law with the legal obligations of Cyprus within the Union law, including of course its obligations under the Charter.

In other words, the only way to prevent a law or decision of the Parliament from being enforced is for the President of the Republic to ask for an opinion on the constitutionality of such a law or decision from the Supreme Court exercising its Constitutional role. If the Court finds that the law or decision or specific provision thereof, is contrary to any provision of the Constitution or of Union law, it cannot enter into force. Thus, the mere failure to consider the Charter in parliamentary debates cannot be controlled by judiciary supervision, but only the situation where a Law is *contrary* to the Charter which is part of Union law. As regards references to the Charter in parliamentary debates, not surprisingly, bearing in mind the lack of reference to the Charter in Cypriot legislation, such references are rarely found. According to the minutes of the Cypriot Parliament, the most recent illustration of a reference to the Charter in parliamentary debates is the session held on the 15<sup>th</sup> October 2015 in relation to the Legal Aid (Amending) (n° 2) Law of 2015 as discussed above (Section I.1.b.). The amending bill that was discussed and voted into law by the House of Representatives, is implementing the third paragraph of Article 47 of the Charter into the Cypriot Legislation.

During these parliamentary debates it was further stressed that, although Article 47 of the Charter has direct effect, it is not applied by the courts of the Republic, because, as mentioned in a relevant case of the Supreme Court, the appropriate mechanism for its implementation does not exist in Cypriot

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Law<sup>38</sup>. This statement apparently made by the representative of the Legal Services of the Republic of Cyprus at the said parliamentary debates, could in fact constitute an explanation of the lack of reference to the Charter by the judges as will be discussed in the following section. Namely, the lack of implementing mechanisms of the Charter in the Cypriot legislation appears to lead to the lack of references to the Charter by national judges. It remains to be determined however what kind of implementation mechanisms should be needed.

### II. THE CHARTER SEIZED BY NATIONAL JUDGES

As explained above (Section I.1.a.) the Supreme Court until recently exercised its powers in three different jurisdictions: the revisional jurisdiction, the first instance jurisdiction and the second instance jurisdiction. However, after the introduction of the Eighth Amendment to the Constitution, the first instance jurisdiction of the Supreme Court has been transferred to the Administrative Court which started its operations on 1 January 2016. It must be kept in mind that our case-law analysis and results are based on the jurisdiction of the Supreme Court when exercising all three different jurisdictions, according to Law 33/64.

#### II.1. The applicability of the Charter

*II.1.a. Do national judges have a fair understanding of the notion of “implementation of EU law” to which Article 51 of the Charter refers, as well as to the case law of the ECJ regarding the matter? Are there divergences between the constitutional court and ordinary judges?*

The notion of “implementation of EU law” within the Charter is a highly contested notion throughout the courts in various Member States and the European Courts; especially after the entry into force of the Lisbon Treaty, when the Charter was elevated to a formally legally binding instrument of EU law, having the same legal status as the Treaties.

After the landmark judgment of *Åkerberg Fransson*<sup>39</sup> the application of the Charter according to Article 51 § 1 became more comprehensive, in favour of a broad interpretation. The ECJ held in paragraph 18 of the judgment that Article 51 § 1 of the Charter confirms the Court’s case law according to which the fundamental rights guaranteed by the Charter must be complied with, where national legislation falls within the scope of EU law. The Court initially referred to the “implementation of EU law”, while then referring to “situations governed by EU law”. It also referred to national laws as being “within the scope EU law”, thus indicating that the Court is equating “implementation” with “scope of application”. As Kyriazis argues, by doing so it chose not to pay close attention to the Charter’s wording, but rather to base most of its reasoning on the

<sup>38</sup> [http://www2.parliament.cy/parliamentgr/008\\_01/008\\_02\\_IE/praktiko2015-10-15.pdf](http://www2.parliament.cy/parliamentgr/008_01/008_02_IE/praktiko2015-10-15.pdf).

<sup>39</sup> ECJ, Case C-617/10 *Åklagaren v. Hans Åkerberg Fransson* ECLI:EU:C:2013:105.

Explanations to the EU Charter, which demand that Member States' actions be "within the scope of EU law" for it to apply<sup>40</sup>.

In relation to the application of the Charter at national level it seems that Cypriot courts are generally aware of the existence of the applicability threshold under Article 51 § 1, even though examination of the said Article itself very rarely occurs. Article 51 § 1 was examined in *Konstantinos Syfantos*<sup>41</sup> where the Applicant had filed two applications for the issuance of *Certiorari* prerogative writs in order to cancel the three disclosure orders issued by the District Court of Paphos, in relation to his personal telecommunication data. The Supreme Court in its earlier *ex tempore* decision, where it granted the permission to the Applicant to file those applications, held that the disclosure orders violated articles 7 and 8 of the EU Charter<sup>42</sup> (the facts of the case are further discussed in Section II. 2. a). The Respondent's advocate had suggested that:

"the scope of the Charter concerning the action of Member States is set out in Article 51 § 1, which provides that the provisions of the Charter are addressed to Member States only when implementing the law of the EU. In this light the ECJ recalled in Case C-617/10 *Akerberg Fransson*, dated 26.2.2013, that it cannot determine, in light of the Charter, national legislation which does not form part of Union law. It is therefore the approach of the Respondent's side, that the provisions of the disputed Law should only be examined under the light of the Constitution".

She further continued that

"the provisions of the Law concerning the rights of access to telecommunication data should be judged in the light of the Constitution only and not of the aforementioned Directive 2006/24/EC".

In examining the legal aspects of the case and the positions of the parties, Judge Liatsos also referred to Article 51 § 1 stressing the scope of the Charter, which provides that the provisions of the Charter are addressed to the Member States only when they implement the law of the Union. He further referred to the case of *Akerberg Fransson* by citing paragraphs 18 and 19 of the judgment of the ECJ. The Court eventually agreed with the approach of the Respondent that

"the provisions of the Charter cannot apply since we are not confronted with the application of Union law, but domestic law and the disputed Law 183(I)/2007 must be examined under the light of the Constitution of the Republic of Cyprus, taking into account Article 8 of the ECHR".

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<sup>40</sup> K. DIMITRIOS, "When does the EU Charter of Fundamental Rights apply? The case of *Fransson* and why we should care", Oxford Human Rights Hub, 16 November 2013, <<http://ohrh.law.ox.ac.uk/when-does-the-eu-charter-of-fundamental-rights-apply-the-case-of-fransson-and-why-we-should-care/>> accessed 20 December 2015.

<sup>41</sup> Civil Application n° 216/14 and 36/2015, 27 October 2015.

<sup>42</sup> Civil Application n° 213/2014, 18 December 2014.

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The Judge interestingly added within this line that:

“[i]n the decision of Matsias, it was found that the inclusion of provisions in the Law, including Article 4 and 5, which provide the way police investigators should access the telecommunication data, occurred “not for the purposes of harmonisation with the European law since such an obligation does not arise nor is imposed by the Directive”

and concluded that the above Articles are not covered by the provisions of Article 1A of the Constitution, which was added by the Fifth Amendment of the Constitution”. In fact the implementation of the Data Retention Directive 2006/24 raised serious constitutional problems in Cyprus which had as a consequence the Sixth Amendment to the Cypriot Constitution with amending Law 51(I)/2010. In the aforementioned decision of *Christos Matsias and Others*<sup>43</sup> the Full Bench of the Supreme Court considered sections 4 and 5 of the Law providing for the Retention of Telecommunication Data 183(I)/2007, to be beyond the intention of the data retention directive and accordingly beyond the scope of Article 1A of the Constitution.

Another important judgment where the scope of the Charter was examined is in the dissenting judgment of *Giorgos Charalambous v. Republic of Cyprus*<sup>44</sup>. The Applicants, in these 7 joined cases, raised a recourse to render the cutting off their salary of the special contribution imposed by the Law on the Special Contribution of Officers, Employees and Pensioners of the State Service and the Broader Public Sector of 2011 (Law 112(I)/2011)<sup>45</sup>, unconstitutional and thus illegal. Pursuant to the disputed Law adopted on 31 August 2011, special contribution is deducted monthly from gross pay and pensions of officials and employees respectively, in the public and the broader public sector except for the hourly workers for the Republic, to the amount specified by the Law. The majority of the Supreme Court dismissed the recourse and declared the Law constitutional since the applicants who bore the burden of proof failed to prove beyond reasonable doubt that the provisions of Law 112(I)/2011 were unconstitutional. The Supreme Court confirmed in particular its case law on the principle of equal treatment, including in taxation<sup>46</sup>, that this must be balanced with the economic situation and fiscal policy in place at the time and that the State has the discretion in “times of extreme economic crisis” to take measures targeting specific groups of the population “without necessarily violating the principle of equal treatment”<sup>47</sup>. Adopting a comparative approach and after examining the legal framework put in place in Cyprus with respect to the special levy (including for the private sector), the Supreme Court subsequently ruled that there had been no breach of the principle of equal treatment and that the measures put in place could not be deemed “extreme” and thus disproportionate

<sup>43</sup> *Christos Matsias and Others* [2011] 1 CLR 152.

<sup>44</sup> Joined Cases n° 1480/2011 – 1625/2011, 11 June 2014.

<sup>45</sup> Law on the Special Contribution of Officers, Employees and Pensioners of the State Service and the Broader Public Sector of 2011, N 112(I)/2011).

<sup>46</sup> Articles 28 and 24 of the Constitution combined.

<sup>47</sup> Translation by the author.



(proportionality was raised with respect to the right to property), given the economic situation in which Cyprus found itself<sup>48</sup>. Nevertheless the significant dissenting judgment delivered by Judges Nathanael, Parparinos and Liatsos interestingly found the disputed Law unconstitutional to the extent that it violates Articles 23, 24, 26 and 28 of the Constitution and Article 1 of the First Protocol of the ECHR, for a number of reasons. One of the grounds was the principle of proportionality and balance as no reference is found in the Law referring at least to the elementary concept of proportionality or balance for the cutting of the special contribution. According to the dissenting judgment, the Law simply removes from the guaranteed right of property of the applicants, part of the salary without any financial compensation in the sense of balance, as required by the ECHR. Along the same line the Judges also invoked Article 17 of the Charter stating that contrary to Article 1 of Protocol 1 of the ECHR, the Charter explicitly states that any lawful deprivation shall be “subject to fair compensation being paid in good time for their loss”. It is also stressed in the dissenting judgment that under Article 17 of the Charter, a deprivation of the right to property is permitted, *inter alia*, in the name of the public interest.

The Constitution, as explained above, contains an extensive list of constitutionally safeguarded fundamental rights in Part II (Articles 6-35), to be exercised “within the framework of public interest and common good”. The balancing exercise used by the courts usually involves a strict (but careful and delicate) construction of the restrictions/limitations to such rights on the basis of Articles 33 and 35 of the Constitution and/or in accordance with the case law of the ECHR (in the case of collusion between classic rights)<sup>49</sup>. It has been suggested however – and this seems to be confirmed by the recent case law of the Supreme Court related to austerity measures put in place in response to the sovereign debt crisis, such as the aforementioned case of *Giorgos Charalambous* – that the test to be satisfied for the protection of social rights “within the framework of public interest and common good” could end up in effect being a higher threshold to meet than for other constitutionally protected fundamental rights<sup>50</sup>. Therefore, and as evidenced once more later in this Report, the overall balancing exercise in relation to the limitation of “public interest” currently taking place in the Cypriot legal order, seems to take different shape according to the facts of the case and the fundamental provision in question. This approach of the Court seems to be inconsistent and problematic and to result in a balancing exercise that offers different levels of protection to the citizens. In the present case, even though the Supreme Court in its dissenting judgment emphasised the legal status of the Charter post-Lisbon and the importance of Article 17, it also stated that there is a very serious parameter to be taken into account. The judges

<sup>48</sup> This part of the section is extracted from C. KOMBOS, S. LAULHE SHAELOU, “The Cypriot Constitution under the impact of EU law: an asymmetrical formation”, in A. ALBI (ed.), *The Role of national Constitution in European and global governance*, TMC Asser Press, 2016 (forthcoming).

<sup>49</sup> C. KOMBOS, S. LAULHE SHAELOU, “The Cypriot Constitution under the impact of EU law: an asymmetrical formation”, in A. ALBI (ed.), *The Role of national Constitution in European and global governance*, TMC Asser Press, 2016 (forthcoming).

<sup>50</sup> *Ibid.*

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made clear that “[t]he CJEU is still evolving the way the Charter should be implemented within European Law itself” and that “[t]he application of the Charter should not be considered as automatic or without consideration”. The case of *Akerberg Fransson* was also mentioned by citing paragraph 19 of the judgment which stresses the fact that the Charter only applies when Member States are implementing Union Law and that a national regulatory setting falls outside this scope.

These judgments are important in the development of the understanding of the notion of “implementation of EU law” by Cypriot courts. In particular, the national analysis of landmark case law of the ECJ, such as the case of *Akerberg Fransson*, is significant to the evolution of the national jurisprudence in accordance with the case law of the ECJ. One may of course retain doubts as to whether Cypriot courts have adequate knowledge of the evolving jurisprudence of the ECJ in relation to Article 51(1), since in the vast majority of cases where the Charter is indeed examined by national judges, no reference is made as to whether the Charter is truly applicable. In certain cases, the Supreme Court or even the Courts of First Instance could have proceeded with a more thorough examination of the applicability issue, before rejecting its application or before choosing to apply the provisions of the ECHR instead. This will also be developed further below, with respect to the *Myrto Christodoulou* case in particular.

### *II.1.b. What is the ordinary judges’ understanding of the horizontal effect of the Charter?*

In the vast majority of EU Member States, it is considered that the main addressees of the obligation to respect fundamental rights are public authorities and not private parties and thus, direct horizontal effect of fundamental rights under national constitutional law is not accepted. There are however some Member States who allow direct horizontal effect explicitly, for specific fundamental rights, while others may accept direct horizontal effect. The issue of horizontal effect for fundamental rights is one that the Cypriot legal system has settled in favour of such rights and corresponding direct obligations imposed on other individuals, even in the absence of relevant prohibiting legislative measure<sup>51</sup>. The Supreme Court stated in the landmark decision of *Yiallourous v. Evgenios Nicolaou*<sup>52</sup>, that “a violation of human rights is an actionable right which can be pursued in civil courts against those perpetrating the violation, for recovering from them, *inter alia*, just and reasonable compensation for pecuniary and non-pecuniary damage suffered as a result and/or other appropriate civil law remedies for the violation”<sup>53</sup>. It can therefore be argued that the right to pursue

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<sup>51</sup>C. KOMBOS, A. PANTAZI, “A Human Rights post Lisbon-Cypriot Report”, in J. LAFFRANQUE (ed.), *The protection of fundamental rights post-Lisbon: the interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and national constitutions*, Tallinn, Tartu University Press, 2012, p. 337.

<sup>52</sup> *Yiallourous v. Evgenios Nicolaou* [2001] 1 CLR 558.

<sup>53</sup> Translated by the author.

civil proceedings for human rights violations is expanded in the horizontal effect, between individuals and it can be exercised either against the State or private parties.

The said case, which has been described as a progressive one for its time, concerned the action for compensation brought against Mr. Yiallourous for tapping telephone conversations of Mr. Nicolaou, the claimant, made through his private phone, for the duration of one year. The said tapings were made without the consent or the knowledge of the victim or the persons conversing with the latter over the telephone. The Court held that there was a direct breach of Article 15 of the Constitution on privacy, irrespective of the fact that the motive of Mr Yiallourous was to reveal unlawful enrichment of the victim owing to the victim's anomalies, omissions and/or improprieties. Mr Yiallourous appealed to the Supreme Court against the finding of the Court of First Instance where CYP£5000 were awarded to the victim in general damages for non-pecuniary or moral damage suffered, arguing that there is no direct right to sue for violations of constitutional rights, when violations do not also constitute torts. The appeal was dismissed by the Supreme Court which held that a plaintiff would be allowed to an award of general monetary damages, wherever there is a breach of a human right causing damage but where that breach does not also constitute a tort/ civil wrong<sup>54</sup>.

The case therefore established that the violation of the plaintiff's right to private life and the right to secrecy of correspondence and communications, as guaranteed by the Cypriot Constitution, provided him with an actionable right. Therefore, victims of human rights violations are entitled to rely directly on the provisions of the Constitution and the European Convention on Human Rights<sup>55</sup>. There is no similar case in relation to fundamental rights under the Charter. However, the application of the horizontal effect of human rights shall be equivalent for the rights of the Charter as well, bearing in mind the position of EU law and of the Charter within Cypriot legislation as explained, and the fact that according to Article 52 § 3, the meaning and the scope of the rights in the Charter shall be the same as those laid down by the said Convention. In the context of the evolving relationship of the Charter with national law and EU law, it remains to be seen to what extent this will be the case in practice.

In the meantime, it would appear that the Cypriot legal system recognises the horizontal effect of human rights under the Constitution, the Convention and the Charter, in civil actions between individuals on the basis of three significant conditions. Those are the importance of the right in question, the existence of a violation and the lack of legislative regulations (the principle of "triangular situation").

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<sup>54</sup>C. KOMBOS, A. PANTAZI, "A Human Rights post Lisbon-Cypriot Report", in J. LAFFRANQUE (ed.), *The protection of fundamental rights post-Lisbon: the interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and national constitutions*, Tallinn, Tartu University Press, 2012, p. 338.

<sup>55</sup> *Ibid.*

## II.2. Implementation of the Charter

### II.2.a. References to the Charter

*Does the constitutional Court use the Charter? Has the Charter been integrated as an instrument of reference of the constitutionality control? How often do ordinary judges refer to the Charter, and are these references more frequent in some domains than in others? What are the most important cases in the internal legal order?*

The appearance and increase in the number of references to the Charter by national judges after the entry into force of the Lisbon Treaty is noticeable but not impressive. Namely, “while EU law should take precedence over conflicting constitutional provisions as a result of Article 1A of the Constitution, the use of the EU Charter by the Supreme Court in its case law is far less developed than the (much older) use of the ECHR”<sup>56</sup>. We cannot thus talk of a development of judicial awareness in relation to EU fundamental rights protection but at least, during the last years, the perception that the national courts in Cyprus never discuss the relevance, provisions, status, binding nature and/or comparability of the Charter with the Constitution or the Convention, has slightly changed.

It appears that the general tendency is for the parties in cases to invoke various fundamental rights established in the Charter, but it is a rare phenomenon for the judges to use those rights further in their decisions and/or to justify their rulings. This phenomenon is probably due to the fact that most of the provisions of the Charter correspond, in general, with the provisions of fundamental rights established in the Constitution. Therefore, judges prefer to use the Constitution and leave the Charter instead for cases that examine rights where no such corresponding rights exist or are covered in the Constitution, such as data protection.

#### II.2.a.i. Supreme Court

In our research we traced 65 judgements decided before the *Supreme Court* in the period between 2005 and October 2015 where reference is made to the Charter<sup>57</sup>. The references are mostly made, by the parties to the case, by specifically invoking one or more of the provisions of the Charter, or by mentioning the Charter as a general source of human rights protection under EU law. As it will be examined, the Charter is less frequently mentioned by the judges themselves.

<sup>56</sup> C. KOMBOS, S. LAULHE SHAELOU, “The Cypriot Constitution under the impact of EU law: an asymmetrical formation”, in A. ALBI (ed.), *The Role of national Constitution in European and global governance*, TMC Asser Press, 2016 (forthcoming).

<sup>57</sup> A word about the methodology used: in our empirical research, we searched the case-law through the databases of Leginet and Cylaw. Each different interim decision for applications of prerogative writs or *ex parte* applications and each final decision is considered as a different judgement even if the parties are the same within the scope of the same case. Judgments of the majority and the minority are always considered as one judgement.

*Initial referencing prior to full legal force of the Charter*

Before moving on to the analysis of the use of the Charter before the Supreme Court, it is important to mention that the very first time the Charter was invoked before the Cypriot Supreme Court was in 2005, in the judgement of *Andreas Constantinou and others v. Republic of Cyprus*<sup>58</sup>. The applicants, namely Andreas Constantinou and three others, applied for a recourse under Article 146 of the Constitution against the decision of the Director of the Civil Registry and Migration Department, in relation to the denial of two employees to work in a specific bar since the two women were already working for a cabaret. The two foreign women could have applied for a change of working place when the duration of their employment contract was completed. The *ex parte* application, asking for an interim order, was based on the position that the said decision is manifestly illegal according to the Cypriot Constitution, Articles 1-15 of the Community Charter of Fundamental Social Rights of Workers and according to the EU Charter of Fundamental Rights. The applicants further stated that Community Law prevailed over Cypriot Law and thus over the disputed decision, resulting in third country nationals, are authorised to work in Cyprus, being on an equal footing with citizens of the Union. However, the Court expressed doubts as to whether European law, namely the Charter, could have the result suggested by the applicant. For this reason the application was dismissed and the judge further clarified that there was a serious matter for debate whether the applicants had a legitimate interest in the recourse. This judgment is not only important due to the fact that the Charter was invoked for the very first time in Cyprus but it is also interesting to note that having the Charter legally binding at that time could have changed the conclusion of the Court.

According to our empirical research, out of the 65 judgments traced, where the Charter is invoked primarily by the parties before the Supreme Court, only in 8 of those cases a reference to the Charter is further made by the national judges. In the remaining 57 judgments, the reference to the Charter is only made by the parties in their statement of claims and the judge refers to it only within this context. It can therefore be argued that only these 8 cases really give a meaning to the Charter and demonstrate the fact that the Charter is developing before the Cypriot courts. It is thus important to explain and analyse some of these important judgments before the Supreme Court, so as to observe the way the Charter is used by the national courts in Cyprus.

*Post-Lisbon referencing – References to EU Charter rights specifically mentioned before the Court*

*Article 17*

The first of the 8 judgments where the Charter is further referred to by the judges is the judgement of the Supreme Court in *Maria Koutselini-Ioannidou*

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<sup>58</sup> Case n° 1230/2004, *Andreas Constantinou, Amber's Night Sport Ltd, Blind Date Ltd, Leuchenco Nadiya and Natalykha Ina v. Republic of Cyprus*, 31 January 2005.

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together with another 47 joined cases<sup>59</sup>, delivered on 7 October 2014. In this judgment the judges invoked the Charter on their own motion, specifically Articles 17 and 52(3). In 2011 a Law was introduced suspending the pensions of those state officials or retired public officers who take up another paid public function or office or position following their retirement<sup>60</sup>. The Law had come as an effort to reduce public spending and as a response to public sentiment, which considered multiple pensions to highly paid public officials amidst the economic crisis as unacceptable. A group of 52 retired public officers whose pension had been suspended under the 2011 Law, as a result of having taken up another paid post following their retirement, applied to the Supreme Court seeking to have the Law of 2011 declared unconstitutional. In October 2014 the majority of the Supreme Court of Cyprus accepted their application and annulled the 2011 law as unconstitutional. The judges interestingly invoked the right to property under Article 17 of the Charter to examine the disputed provision. The Supreme Court stated that

“[a]ccording to Article 17 of the Charter, the right to property cannot be limited, unless for the purposes of the public interest, in the cases and under the conditions that are provided for in Law, provided that fair compensation is paid in due time, for the loss. In the present case we observed that there is no provision for fair compensation for the loss suffered by the Applicants in the Law, but neither any arrangement has been made for payment to them, of fair compensation in due time. Therefore, neither Article 17 of the Charter can render the disputed provision as valid, as compatible with the *Acquis Communautaire*”<sup>61</sup>.

This is probably the only occasion where the Supreme Court has examined the constitutionality of a Cypriot law or a provision thereof, in relation to the provisions of the Charter and actually based its decision on this examination.

The dissenting judgment of the minority by Judges Pampalis, Paschalides and Christodoulou is also interesting. The judges had dismissed the recourses of the applicants, concluding that there has not been “deprivation or restriction” under Article 23(2) of the Constitution, as analysed, and also that it cannot be said that the disputed Law “has extinguished” the applicants’ pensions. Consequently, they argued that the Court had the matter settled by the analysis made and that it was not necessary to deal with the constitutionality of Section 3(b) of the disputed Law. The judges in the dissenting judgment invoked Article 17 of the Charter as an additional legal basis to the recourse of the applicants, who had mainly focused on the corresponding right of the Cypriot Constitution (Article 23) and stressed out the protection afforded by the Charter to the right to property. Article 52 § 3 was also invoked, emphasising the relationship between the Charter and the ECHR. Therefore, by stressing this connection, the Court only referred to the case law of the European Court of Human Rights (“ECtHR”)

<sup>59</sup> Joined Cases n° 740/2011-587/2012, 7 October 2014.

<sup>60</sup> Law on pensions of state officials (General Principles) of 2011, N.88(I)/2011.

<sup>61</sup> Joined Cases n° 740/2011-587/2012, 7 October 2014.

in relation to the analysis of the deprivation of the right to property established in Article 1 of Protocol of the Convention and not to any case law of the ECJ.

This judgment should be contrasted with the case of *Giorgos Charalambous v Republic of Cyprus* previously developed as here, the reduction of pensions of retired civil servants and public officers who have been re-employed in the public sector based on Law 88(I)/2011, was deemed unconstitutional on the basis of Article 23 of the Constitution, independently of the current economic climate and/or any obligations as may arise under EU law, the EU Charter and/or the ECHR. In the majority decision in *Maria Koutselini-Ioannidou*, the Supreme Court distinguished this case from the previous one on the basis that pensions are a property right which cannot be limited in the name of public interest on the basis of Article 23 of the Constitution. In the second judgment in the case, however, Judge Michaelidou referred to the expression of the general concept of public interest, included in Article 23 under the form of public benefit and to the need to justify it in order to rely on it<sup>62</sup>.

The present analysis should also be connected to the previously examined case of *Myrto Christodoulou*<sup>63</sup> concerning the legality of the measures adopted to impose the “bail-in” in Cyprus. As previously outlined, the majority decision classified the matter as one belonging to the sphere of private law and therefore the proper course of action was to initiate actions for damage for breach of contract and tort law<sup>64</sup>. Therefore the issue was not one of administrative law as it concerned the loss suffered during the “bail-in” and whether this loss would have been greater had the bank been put under liquidation rather than under resolution<sup>65</sup>. Even though fundamental rights under the Charter did not affect the conclusion of the Court, what is noteworthy is the dissenting judgment by Judge Erotokritou who took a totally different approach. The Judge related the disputed matter to human rights, by stating that it affects the right to property as protected under Article 17 of the Charter and under Protocol 1 of the ECHR, as well as Article 23 of the Cypriot Constitution. He noted, in particular, the difference of scope between private law and public law actions before the national courts, with the result that only the judicial administrative control of the measures at stake, before the Supreme Court of Cyprus, could encompass a test of proportionality and reasonableness, including vis-à-vis EU law instruments, with special reference to the EU Charter and to the free movement of capital. Such a “compatibility test”, he added, could be undertaken by a national court directly applying EU law, including general principles, and referring to the ECJ questions of interpretation or of validity in the event of uncertainty. Judicial dialogue would no doubt be available to all national courts, including the lower civil courts provided, however, the measures at stake do not escape the scope of review by being classified as “acts of government”, which is for the Supreme Court to determine, under its exclusive administrative revisional jurisdiction,

<sup>62</sup> Joined Cases n° 740/2011-587/2012, *Maria Koutselini-Ioannidou*, 7 October 2014.

<sup>63</sup> *Myrto Christodoulou* [2013] 3 CLR 427.

<sup>64</sup> C. KOMBOS, *The Impact of EU law on Cypriot Public Law*, Sakkoulas Publications, 2015, p. 97.

<sup>65</sup> *Ibid.*

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thereby effectively restricting the full essence of the test to its application by the Supreme Court. Judge Erotokritou warned against “political decisions” being taken overnight under extreme pressure (including at the EU level), allegedly in the interest of the State, escaping the test and undermining the rule of law and the principle of legality common to both the national and the EU legal orders. He then concluded that the compatibility test includes a review of the balance between the public interest and the restrictions on individual rights within the framework of the Constitution and of the EU Treaties, which can only be undertaken by the Supreme Court within its exclusive administrative revisional jurisdiction, and which must be maintained at all times, including during crisis time<sup>66</sup>.

### Article 47

The next case where the Court referred to the Charter in issuing its decision is the Civil Appeal between *Hadwen James, detainee at the Central Prison v Attorney General*<sup>67</sup>. The Supreme Court acting as an appeal court, upheld the findings of the trial court to the extent that it had allowed a request for adjournment in order to call an expert witness from Malta to testify that the offence for which he was arrested was time-barred but refused to grant a second adjournment, noting that the procedure for the execution of a EAW must occur within a strict time frame. The fact that the trial court omitted to hear the appellant was not sufficient to render the decision of the District Court to execute a European arrest warrant invalid. The appellant had argued *inter alia* violation of the right to a fair trial, the right to be heard, the right to present testimony to prove the abuse of process and the delay in the issue of the European arrest warrant, as well as the right to challenge the lawfulness of his detention under Article 5 § 4 of the ECHR, thereby alleging that the European arrest warrant should not be executed against him. The appellant had argued that Articles 5 and 6 of the ECHR and the corresponding Articles 6 and 47 of the EU Charter were directly applicable to his case. The Supreme Court proceeded with an analysis of the reasons for appeal including the provisions of the Charter but dismissed the appeal. The Court nevertheless stressed the importance of the provisions of the Charter since they are part of Union primary law, while the Member States and the EU institutions are bound to respect the provisions of the ECHR as well.

Likewise, similar issues in relation to a European arrest warrant, were raised in the Civil Application of *Nikolas Kyriakou Ypermachou*<sup>68</sup>. This is another case where the Judge of the Supreme Court, this time within the first instance jurisdiction, resorted to the Charter in giving the ruling. The Applicant sought the issuance of the prerogative writ of *Certiorari*, in order to annul the decision of the District Court of Larnaca dated 26 June 2015. What is important in this case is not the facts of the case but rather the invocation of the Charter by the Judge on his own motion. The application was initially based on Article 30 of

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<sup>66</sup> Part of this section has been extracted from S. LAULHE SHAELOU, P. ATHANASSIOU, “European Banking Union – Cyprus Report”, Wolters Kluwer, 2016 (forthcoming), question 38.

<sup>67</sup> Civil Appeal n° 184/2014.

<sup>68</sup> Civil Application n° 95/2015, 23 July 2015.



the Cypriot Constitution and Article 6 of the ECHR. While examining the legal issues the Judge added the corresponding Article 47 of the Charter and stressed the importance of the provisions of the Charter that now have the same legal value as the Treaties. The Court further mentioned the significant relationship between the Charter and the ECHR, stating that the ECHR constitutes part of the general principles of Union law according to Article 6 TEU. The civil application was successful and the Supreme Court held that the referred judgment of the District Court, was decided in violation of the right of the applicant to be heard. It would therefore appear that there is some development in specific areas of case law, where national Judges make an effort, including at first instance, to consider the Charter when delivering their decisions.

*Post-Lisbon referencing – When EU Charter Rights do not correspond to Rights protected under Constitution.*

The next important judgment is the civil application of *Konstantinos Syfantos*<sup>69</sup> before the Supreme Court within the first instance jurisdiction, of 18 December 2014, where the applicant requested the grant of permission for filing an application for the issuance of a *Certiorari* prerogative writ. This judgment is an example of reference to the Charter for specific provisions of fundamental rights not included in the Cypriot Constitution, namely the protection of personal data. The Supreme Court first examined whether the applicant had a legitimate interest in the cancellation of the disclosure orders. Since the disclosure orders concerned the applicant's own telephone data for the purpose of instituting criminal proceedings against him, the Court concluded that the applicant did have a legitimate interest. Having established that, the Court found that the disclosure orders violated Articles 7 and 8 of the EU Charter, in view in particular of the *Digital Rights Ireland* case where the ECJ invalidated Directive 2006/24/EC and the corresponding transposing national legislation<sup>70</sup>. The Court thus granted the permission for filing an application for the issuance of a prerogative writ of *Certiorari* nature<sup>71</sup>. Konstantinos Syfantos had filed two applications<sup>72</sup> for the issuance of *Certiorari* prerogative writs in order to cancel the three disclosure orders issued by the District Court of Paphos, in relation to his personal telecommunication data. What is quite interesting in this judgment in relation to the Charter, is the use of Article 51 § 1 itself by the judge. As explained above (Section II. 1. a.), in this judgment the Court discussed the scope of application of the Charter in relation to Law 183(I)/2007, by referring to Article 51 § 1 and the case of *Akerberg Fransson*, as a response to the respondent's advocate's suggestion that the disputed Law should only be examined in the light of the Constitution. Even though the Court came to the conclusion that the provisions of the Charter could not apply since the disputed Law did not constitute an

<sup>69</sup> Civil Application 36/2015 (*ex tempore*), 18 December 2014, for the issuance of a prerogative writ of *Certiorari*.

<sup>70</sup> Law on the Retention of Telecommunications Data for the purpose of investigating serious crimes N.183(I)/2007.

<sup>71</sup> We would like to thank Mrs. Corina TRIMIKLIONOTIS for her assistance with this case.

<sup>72</sup> Civil Applications 216/14 and 36/2015, 27 October 2015.

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implementation of Union law, it appears that national judges in Cyprus have a growing understanding of the notion of “implementing Union law” or have at least slightly developed the national jurisprudence on this issue.

Another important judgment is the civil application of *Petros Thrasyvoulou and Diamanto Thrasyvoulou*<sup>73</sup>, who claimed for the issuance of a *Mandamus* prerogative writ. Through this proceeding the applicants sought an order from the Attorney General and the Police Director of Morphou, so as to release to them the name(s) of the Mines Service officers who were responsible for controlling the mine privilege issued in favour of the company Skyropiia Symeon Ltd. The Judge in this application invoked, on his own motion, Article 15 TFEU in relation to the right of the citizens to access documents. He further referred to Directive 2003/98/EC on the re-use of public sector information which was implemented into Cypriot law with the Re-use of Public Sector Information Law (Law 132(I)/2006). More importantly, Article 48 of the Charter was referred to in relation to the right of access of Union citizens to documents of Union and national bodies when apply EU law. Under Article 41 of the Charter establishing the right to good administration, there is also a specific aspect that ensures the right of every person to have access to his or her file, as a consequence of the right of defence, in case of imposing sanctions. Relying on these legal bases, the Supreme Court concluded that the said application is successful.

### *Implicit reference to the Charter*

Another important judgment is the *Revisional Appeal of Charis Christodoulou before the Supreme Court within the second instance jurisdiction*<sup>74</sup>, where an implicit reference to the Charter was made in relation to Article 21. The appellant is a public servant who had applied for a promotion position but the Public Service Committee selected another candidate who was more senior in age. She appealed against this decision claiming that to the extent that it relied exclusively or primarily on age seniority, the Court violated the Employment Equality Directive 200/78/EC and the implementing national Law on Equal Treatment in Employment and Occupation, (Law 58(I)/2004). The trial Court rejected the first instance application by Charis Christodoulou, on the ground that the Public Service Committee’s reference to age seniority does not appear to be the determining factor in selecting another candidate for promotion and added that taking age seniority into account is not only lawful but also endorsed by the Public Service Law (Law 1/1990), which provides that where two employees have the same date of appointment, seniority is determined on the basis of the employees’ age<sup>75</sup>. The appellant appealed against the trial Court’s decision arguing that the seniority criterion in the meaning of the biological age of the employees with the same date of appointment, in order to select for promotion, amounts to age discrimination and violates the Directive. She further submitted that a preliminary reference to the

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<sup>73</sup> Civil Application n° 202/2014.

<sup>74</sup> *Charis Christodoulidou v. Republic of Cyprus through the Public Service Committee*, Case n° 12/10, 3 April 2015.

<sup>75</sup> European Commission, “European Equality Law Review”, issue 2/2015 (translation by the author).

ECJ in accordance with Article 267 TFEU is necessary since “the sole ground for the appeal is immediately relevant to the interpretation of Articles 1, 2, 3, 6 and 16 of the Directive, which combined with Article 10 of the TFEU and Article 21 of the EU Charter prohibit all forms of discrimination”.

Even though the decision of the Supreme Court was at final instance, the Court rejected the appellant’s request for referral to the ECJ and, making no further reference to the Charter, ruled that the Directive permits Member States a wide margin of appreciation in relation to the measures adopted in the field of “social policy”, provided the measures do not violate the principle of non-discrimination. More importantly, the Court concluded that the regulation of seniority under Article 49 of the Public Service Law cannot be deemed as violating the principle of non-discrimination on the grounds of age, since it does not disadvantage a particular civil servant or a particular group of civil servants. According to the Court

“[o]n the contrary, the said provision is a fair and objective regulation of the seniority issue, which applies to all cases of employees in the same position and does not in any cause discrimination against the appellant”.

The Supreme Court’s analysis regarding the wide margin of appreciation given to Member States to legislate in the field of “social policy”, raises doubts in at least two aspects; firstly as to whether national Judges have a fair understanding of the scope of “social policy” and secondly, as to whether an explicit reference to the Charter and its interpretation instead of the Directive could have altered the final ruling of the Court in any way.

In conclusion, although references to the Charter before the Supreme Court, started very soon upon its entry into force at the initiative of the parties (and even before the Charter obtained its binding status), it was with limited success until very recent years. As examined above, it is only during the last years that the judges engaged in limited discussion on the relevance, the provisions and the binding nature of the Charter. There remains therefore much scope for the development of the use of the EU Charter by the national courts in Cyprus.

Table 1:  
Cases of the Supreme court expressly referring to the Charter

	2005	2007	2008	2009	2010	2011	2012	2013	2014	2015	Total
Second Instance Jurisdiction	0	0	0	0	0	1	0	2	2	3	7
First Instance Jurisdiction	0	0	0	0	0	0	7	6	5	9	27
Revisional Jurisdiction	1	3	1	0	1	3	4	9	6	2	30

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### II.2.a.ii. Courts of first instance

Following the analysis of the use of the Charter before the Cypriot Supreme Court, an analysis of the corresponding case law before the courts of first instance is required. Based on our empirical research, we traced 46 judgments heard before the courts of first instance in Cyprus where reference to the Charter is made. Reference is either made on the initiative of the judges themselves as an inspirational source or as a legal basis in their rulings, or by the parties to the case (see Table 2 for details). According to our empirical research, all the judgments making a reference to the Charter were decided before the District Courts of different cities, which have the jurisdiction of civil and criminal cases with a sentence of maximum 5 years imprisonment. Only three of the said cases were traced before the Court of Assize which has jurisdiction to hear criminal cases for offences punishable by more than 5 years imprisonment. No cases at all were traced before the Family Courts, the Rent Control Tribunals, the Industrial Disputes Tribunals or the Military Court. Moreover, it appears that the trend identified at the Supreme Court also applies to the courts of first instance, to the extent that national judges are quite reluctant to invoke provisions directly from the Charter. The parties to the cases are usually the ones invoking the fundamental rights from the Charter but it would also appear that their lawyers are not familiar with the mechanisms of the Charter. Out of the 46 judgments traced before the courts of first instance where a reference to the Charter is made, only in three of them national judges seem to contribute a further reference or apply the Charter.

#### *Explicit reference to the Charter*

The first judgment is *Christoforos Karagiannas & Sons Ltd v Cornelius Desmond O'Dwyer*<sup>76</sup>, before the District Court of Famagusta. The judgment concerns the interim decision of the Court in relation to an application for adjournment so as to proceed with an application for legal aid. The national judge, in order to balance the alleged rights of the defendants-applicants to legal aid with the rights of the claimants for a trial within reasonable time, referred to the Charter on his own initiative. The judge stated that a balancing exercise of the two abovementioned rights could be needed as follows; the right to legal aid is established by the ECHR under Article 6 § 3 (c) and the EU Charter under Article 47 while the fundamental right of a party to obtain legal judgment within reasonable time is established under Article 30(2) of the Cypriot Constitution. In the aftermath, the application for an adjournment was dismissed since, as the Court stated, it is not a situation where such a balancing exercise is needed because the rejection of an adjournment does not adversely affect the right of the defendants-applicants to proceed with an application for legal aid.

The second judgment worth discussing is the application of *Leonid-Ivanov Spiriev*<sup>77</sup> for legal aid. The applicant, who was a requested person under a

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<sup>76</sup> Case n° 365/06, 1 November 2011.

<sup>77</sup> Application n° 49/2014, 5 March 2014.

European Arrest Warrant, claimed that he did not have the financial capacity to appoint a lawyer himself. Because of this stance, the Court interrupted the procedure and planned the case in such a way that the applicant was able to submit in writing a request for legal assistance. When examining the legal aspect of the request, the Court referred to Articles 47 and 48 EU Charter, as well as to Article 6 ECHR and Article 30(3) of the Constitution. The Court further discussed the importance of Article 47 EU Charter as contained in the Council Framework Decision 2002/584/JHA<sup>78</sup> concerning the national procedures of the European Arrest Warrant, which provides that there should be an option for free legal aid to requested persons under a European Arrest Warrant. More importantly, an extensive reference to the Charter was made by the judge in relation to Directive 2013/48/EU, namely to the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and to the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty<sup>79</sup>. Despite the fact that the application was eventually dismissed, after the examination of the socio-financial Report of the Welfare Office, these references by the Court arguably constitute very important steps towards judicial awareness in relation to EU fundamental rights protection under the EU Charter.

*Implicit reference to the Charter*

There is another judgment where a less extensive reference of the Charter is made, but which nevertheless contributes to the development of judicial awareness regarding fundamental rights protection under the Charter. It is a criminal case before the Assize Court of Nicosia, *Republic v. M.O.*<sup>80</sup>, concerning the sentence of an accused person in 16 charges in total, including the invitation of a child by electronic means for involvement in child pornography and the possession of child pornography. In order to examine the legal aspect of the classification of the sentence imposed, the judges referred to the Charter in connection with Directive 2011/92/EU<sup>81</sup>. The judges cited paragraph 1 of the Directive, that

“sexual abuse and sexual exploitation of children, including child pornography, constitute serious violations of fundamental rights, in particular of the rights of children to the protection and care necessary for their well-being, as provided for by the 1989 United Nations Convention on the Rights of the Child and by the Charter of Fundamental Rights of the European Union”.

They further added that serious forms of sexual abuse and sexual exploitation of children should be subject to effective, proportionate and dissuasive penalties.

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<sup>78</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the framework decision.

<sup>79</sup> Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013.

<sup>80</sup> Case n° 27430/14, Judgment of 16 February 2015.

<sup>81</sup> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

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### *No mention of the Charter on the part of national judges*

A good degree of judicial awareness towards the Charter is also needed on the side of the lawyers, who appear overall to be willing to use the Charter and quite familiar with its mechanisms. A good illustration of a reference to the Charter by the parties only is a series of cases before the District Courts of Nicosia raised by the Cyprus Radiotelevision Authority. There are 13 cases in total, three cases in 2008, one in 2009, five in 2010, three in 2011 and one in 2013 before the District Court of Nicosia, all raised by the Cyprus Radiotelevision Authority. In all cases the provision raised by one of the parties is Article 47 EU Charter, which appears to be the most commonly used fundamental right provision of the Charter in Cyprus. What is important in the majority of the said series of cases is that, although no further mention was made to Articles 47 and 48 EU Charter, by the judges in particular, the Court nevertheless stressed the importance of the right to defence in a case, where an application for a summary judgment exists.

The facts of these cases, stated briefly, consist in the applicants suggesting that the defendants owed them a specific amount as administrative fine and applied for a summary judgment in order to prevent them from filing a defence, seeking from the Court the issuance of a decision against the defendants. The respondents-defendants suggested that the collection of any amount from the applicants-plaintiffs would be contrary to Articles 47 and 48 EU Charter and they also invoked Articles 165-167 of the Constitution and Article 6 § 1 of the ECHR. In the vast majority of the cases, the Court kept the same legal approach and dismissed the applications for a summary judgement stressing the importance of the right to defence in a trial.

Table 2:  
Cases of the Courts of first instance expressly referring to the Charter

	2007	2008	2009	2010	2011	2012	2013	2014	2015	Total
District Court Larnaca	0	0	0	1	1	0	0	3	0	5
District Court Nicosia	0	3	1	5	3	1	3	8	2	26
District Court Limassol	0	0	0	0	1	1	0	3	1	6
District Court Paphos	0	0	0	0	0	1	1	3	0	5
District Court Famagusta	0	0	0	0	1	0	0	0	0	1
Assize Court Nicosia	0	0	0	0	0	0	0	0	3	3

Based on the above analysis of the case law, it can be argued that the approach identified for the Supreme Court also applies to the courts of first instance. Overall, it can be said that judges seem to be reluctant to invoke and interpret fundamental rights provisions directly from the Charter or by extending further a reference already made by the parties to the case. Secondly, the number of references made to the Charter in general is minimal, in comparison with the amount of cases filed every year before the Supreme Court and the courts of first instance. Thus, the initial perception of the minimal use of the EU Charter in Cyprus appears to be confirmed even if the trend of referring to the Charter has been accelerating in recent years, hopefully leading to wider judicial awareness towards the EU Charter in the future.

References to the Charter before the Supreme Court however clearly remain a lot more than those before first instance courts, bearing in mind that the number of cases filed every year in the lower courts in all jurisdictions is approximately 40 times more than the cases filed in the Supreme Court. Based on the Statistical Data Archive of the Government, in 2009 more than 130000 cases were filed in the lower courts in all jurisdictions<sup>82</sup>, whereas during the same year, almost 3000 cases were filed in the Supreme Court<sup>83</sup>.

*II.2.b. The Charter as a source of inspiration among others - Articulation of the Charter with internal and European law*

II.2.b.i. How do national judges interpret Article 53 of the Charter allowing a stronger national protection of rights? Generally, would you say that national judges are willing to offer a more generous protection or do they entirely rely on the Charter and the interpretation given by the ECJ?

In the vast majority of the judgments of Cypriot courts, where a reference to the Charter is made either by the parties to the case or the judges, relevant or corresponding provisions of the Cypriot Constitution are invoked as well, along with the provisions of the Charter. It is thus a combined use of constitutional rights and the Charter. Article 53 EU Charter on the level of protection, was examined in various cases before the ECJ, as a tool for Member States to ensure that the Charter does not replace the Member States' constitutional level of protection of fundamental rights where higher than the Charter. This however, does not appear to be an issue in Cyprus since, as previously explained, the fundamental rights protection at the level of the ECHR (explicitly) and of the Charter (implicitly), is fully enshrined in the Constitution.

One of the most important cases in this respect is the *Melloni* case<sup>84</sup>, where the ECJ examined whether Member States are still allowed to impose a higher level

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<sup>82</sup> <http://www.supremecourt.gov.cy/Judicial/SC.nsf/All/8101980A0C55FCF2C22577180038DD89?OpenDocument>.

<sup>83</sup> <http://www.supremecourt.gov.cy/Judicial/SC.nsf/All/5F86D9DC88823FA7C22577180038F525?OpenDocument>.

<sup>84</sup> ECJ, Case C-399/11, *Melloni v. Ministerio Fiscal*, ECLI:EU:C:2013:107.

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of fundamental rights' protection for cross-border cooperation in criminal matters than the standard set by EU law<sup>85</sup>. The ECJ stressed the importance of the principle of supremacy of EU law and ruled that the Member States are allowed to apply standards higher than those embedded in the Charter but these standards may not infringe the rules of EU law. In other words, Member States can still go beyond what is required by EU law, but only to the extent that the subject matter has not been completely regulated by the Union<sup>86</sup>.

We have not so far met a case in which an issue under Article 53 of the Charter itself has arisen in Cyprus. There are cases where the applicants invoke Article 53 EU Charter, such as the case of *Michalis Athanasiou et al*<sup>87</sup>, yet no further discussion has been made around Article 53. However, a reference to the *Melloni* case was made in the dissenting judgment of *Giorgos Charalambous v. Republic of Cyprus*<sup>88</sup>, discussed above (Section II.1.a.). While discussing in their dissenting judgment whether to examine the disputed issue under the light of the Charter as well or merely under the scope of the Constitution, the Court made reference to some very serious parameters to be taken into account, namely, Article 51 EU Charter, the case of *Fransson* and the *Melloni* case. The Court in its dissenting judgment stated that: "[t]he CJEU is still evolving the way the Charter should be implemented within European Law itself. The application of the Charter should not be considered as automatic or without consideration. The CJEU in two recent decisions of its Grand Chamber, the *Aklagaren v. Hans Akerberg Fransson*, dated 26.2.2013 and *Stefano Melloni v. Ministerio Fiscal*, dated 26.2.2013, reaffirmed some rules". The judges then cited paragraph 60 of the *Melloni* case which states that:

"[i]t is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised".

By making reference to this particular case, the Court in its dissenting judgment ruled that the disputed Law would be examined only in the light of national law, namely the Constitution of the Republic. Therefore, the Court used Article 53 through the *Melloni* case to allow a stronger national protection of rights.

Most national judgments reveal a trend towards offering a more generous protection through constitutional provisions. However, as regards the general relationship between the national level of protection of fundamental rights under

<sup>85</sup> V. FRANSSEN, "Melloni as a wake-up call – Setting limits to the higher national standards of fundamental rights' protection", European Law Blog, 10 March 2014, <<http://europeanlawblog.eu/?p=2241>> accessed 15 December 2015.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Michalis Athanasiou, Maria Christoforou, Maroula Christoforou, Christos Christoforou and A&A Ideal Mail Order Ltd v. Coop Kouriou LTD*, Case n°. 5071/13, 10 June 2014.

<sup>88</sup> Joined Cases n° 1480/2011 – 1625/2011, 11 June 2014.



the Constitution and their protection under the Charter, it can be argued that national judgements also reveal a trend towards using the Charter to enhance the already established broad provisions of human rights and give them more weight within the national legal order and not to diminish the Charter while offering stronger national protection. In other words the provisions of the Cypriot Constitution are believed to be broader than the provisions of the Charter and thus the judges prefer to offer a more generous protection through the national mechanisms, without diminishing the protection of fundamental rights under the Charter.

II.2.b.ii. Is the Charter interpreted in reference to the European Convention on Human Rights as provided by Article 52 § 3? It would be interesting to have further information on the authority and application of the case law of the ECtHR, compared to the authority and application of the case law of the ECJ.

The Constitution of Cyprus, as explained, is designed based on the Convention and that structural connection, has been strengthened by the remarkable willingness of the Supreme Court to rely on the jurisprudence of the ECtHR, in order to construe properly the constitutional provisions on fundamental rights<sup>89</sup>. As Kyriakou argues:

“the human rights protection afforded by the constitutional provisions is similar to the one provided by the ECHR. In many instances the wording of the two texts is identical. To the extent that the two coincide or share common elements, the normative protection afforded to individuals is the same”<sup>90</sup>.

In other instances however, the scope of the protection of fundamental rights under the Constitution may be broader<sup>91</sup>. Overall, the Supreme Court of Cyprus has shown an outstanding willingness to refer not only to the Convention but also to the decisions of its organs, thus elevating the relevant decisions to a position of a highly influential source of law<sup>92</sup>.

In the vast majority of the Cypriot judgments traced above, the legal issues examined by the Court were dealt with by reference both to the Charter and to the ECHR. We were able to trace only one case in which Article 52 § 3 EU Charter was mentioned, the dissenting judgment of the case of *Maria Koutselini-Ioannidou et al* before the Supreme Court<sup>93</sup>. As explained above (Section II.2.a.),

<sup>89</sup> C. KOMBOS, A. PANTAZI, “A Human Rights post Lisbon-Cypriot Report”, in J. LAFFRANQUE (ed.), *The protection of fundamental rights post-Lisbon: the interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and national constitutions*, Tallinn, Tartu University Press, 2012, p. 327.

<sup>90</sup> N. KYRIAKOU, “National Judges and Supranational Laws on the Effective Application of the EC Law and the ECHR: The Case of Cyprus”, 2010, <http://ssrn.com/abstract=1623560> or <http://dx.doi.org/10.2139/ssrn.1623560>.

<sup>91</sup> G. PIKIS, *Constitutionalism - Human Rights - Separation of Powers*, Leiden, Martinus Nijhoff, 2006, p. 43.

<sup>92</sup> C. KOMBOS, A. PANTAZI, “A Human Rights post Lisbon-Cypriot Report”, in J. LAFFRANQUE (ed.), *The protection of fundamental rights post-Lisbon: ... op.cit.*, p. 310.

<sup>93</sup> Joined Case n°. 740/11 – 587/12, 7 October 2014.

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the judges had initially invoked the right to property under Article 17 of the Charter, as an additional legal basis to the corresponding Article 23 of the Constitution in the recourse of the applicants. They further invoked Article 52 § 3 emphasising the relationship between the Charter and the ECHR. Therefore, by stressing this connection, they only made reference to the case law of the ECtHR in relation to the analysis of the deprivation of the right to property established in Article 1 of Protocol of the Convention and not to any case law of the ECJ. This is probably because in this way the judges could correlate the case law of the ECtHR with Article 23 of the Constitution, which arguably has the same meaning and scope as Article 1 Protocol 1 of the Convention (despite being much more detailed and extensive)<sup>94</sup>.

The general trend of litigants and national judges in Cyprus is to follow the already established legal argumentation and interpretation. It can thus be argued that the Cypriot courts often work in favour of the ECHR and of the jurisprudence of the ECtHR. This phenomenon is expectable owing to the much longer history of the ECHR and the variety of case law and interpretations of its provisions. This could also be due to the significant fact that the ECHR applies to all cases falling under the scope of fundamental rights, in contrast to the *prima facie* more restrictive applicability of the Charter under Article 51. According to Article 51, the provisions of the Charter only apply when the Member States are implementing Union law. This limitation can result in a restrictive applicability of the Charter compared to the relatively broader applicability of the ECHR, whenever a violation of a right is raised. For instance, it could be derived from the case law of the ECJ that when it comes to the adoption of national laws within the scope of the ESM Treaty under macroeconomic adjustment programmes, the provisions of the Charter cannot be invoked. Following the Court's decision in *Pringle*<sup>95</sup>, if measures adopted under the ESM Treaty appear to derive from the scope of international agreements and not to constitute implementing Union law, when it comes to alleged violations of fundamental rights through the said agreements, it would appear that the only relevant instrument for the protection of fundamental rights would be the ECHR as an international convention. Nevertheless, there is perhaps an alternative reading which consists in considering as a starting point the nature of the right to judicial protection as a general principle of EU law. It was argued elsewhere by one of the authors of this Report that

“Member States, even if acting outside the scope of EU law and enjoying wide discretion, are still expected to ensure the protection of the general principles of EU law, as embodied *inter alia* in the EU Charter, through a test of reasonableness and proportionality to be applied by the national courts<sup>96</sup>.”

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<sup>94</sup> A. C. EMILIANIDES, “Cyprus”, in A. ALEN, D. HALJAN (eds.), *International Encyclopaedia of Laws: Constitutional Law*, Alphen aan den Rijn, Kluwer Law International, 2013, p. 181.

<sup>95</sup> ECJ (Full Court), Case C-370/12 *Thomas Pringle v. Government of Ireland, Ireland and The Attorney General* ECLI:EU:C:2012:756.

<sup>96</sup> Deriving *inter alia* from ECJ, Case C-71/02, *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH* ECLI:EU:C:2004:3025, § 49.

This view appears to find some resonance in Judge Erotokritou's dissenting judgment [in the *Myrto Christodoulou* case]<sup>97</sup>.

Thus, according to this view,

“[t]he fact that the application of the EU Charter was excluded in the *Pringle* case with respect to the ESM Treaty does not mean that this should be the case for all Eurozone crisis measures [...]. In any case, the fact that the Charter did not preclude the Member States from entering into the ESM Treaty and from ratifying it does not necessarily mean that the Charter should be of no significance within the Member States with respect to measures derived from the ESM Treaty or other Eurozone crisis measures”<sup>98</sup>.

### *II.2.c. The Charter as a source of inspiration*

*Do national judges refer to the Charter as a purely substantial source of inspiration even outside of its field of application?*

As it has been observed in the previous section, Cypriot judges tend to restrict themselves to what is absolutely necessary, regarding the use of the Charter. Therefore it could appear that they do not leave much space for a less formal use of the Charter, outside the judicial argumentation, as a purely substantial source of inspiration. However, there are a few instances in which such a use has been observed.

An illustration of the use of the Charter as a source of inspiration is the fact that the courts in Cyprus, both the Supreme Court and the courts of first instance, made references to the Charter before the entry into force of the Lisbon Treaty, as indicated in Tables 1 and 2 above. There are however situations where the Charter was used by the parties of the case as a source of inspiration and no further use was made by the judges.

The first judgment to be examined is *S & S Ilektrologikes Egkatasaseis Ltd*<sup>99</sup> delivered by the Supreme Court on the 17 January 2007 (Revisional Jurisdiction). This case concerns a recourse under Article 146 of the Constitution, where the main argument of the applicants was that based on Article 15 of the Charter, third country nationals who are authorised to work on the territory of the Member States, are entitled to working conditions corresponding to those enjoyed by Union citizens. After dismissing the recourse due to the fact that the applicants do not have a legitimate interest to an action under Article 146 of the Constitution since the case does not constitute an enforceable administrative act, the Court made an observation on Article 15 § 3 of the Charter. It stated that Article 15 § 3 of the Charter does not deprive the sovereign Member States of the EU from the right to decide for themselves and regulate the issue of providing or not, a work permission to third country

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<sup>97</sup> S. LAULHE SHAELOU, P. ATHANASSIOU, “European Banking Union – Cyprus Report”, FIDE 2016 Congress, Wolters Kluwer, 2016 (forthcoming), question 38.

<sup>98</sup> *Ibid.*

<sup>99</sup> Case n° 1033/2005, 17 January 2007.

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nationals as well as the terms and conditions under which such licenses are granted. Thus the Article arguably could not help the case of the applicants in relation to the renewal of employment contracts. Therefore in this case, even though Article 15 of the Charter was primarily invoked by the applicants and not the Court itself, the judge explained and interpreted the use of the Charter in Cyprus. It can thus be argued that, although strictly interpreted, Article 15 of the Charter was used as a purely substantial source of inspiration by the judge who had interpreted it, even without having a legally binding effect. This approach could be regarded as being in line with the duty of interpretation on the courts in relation to the indirect effect of international and EU law.

The courts in Cyprus have long recognised the principle of indirect interpretation of national law in the light of international treaty provisions, at least as far as the treaties concerned show an intention of promoting the “values and the protection of human rights”<sup>100</sup>. This was confirmed by the Supreme Court in *Nebojsa Micovic v. Republic of Cyprus through the Director of Migration Services*<sup>101</sup>, where Judge Nicolaides ruled on the basis of ECJ case law that a directive, for which the deadline for transposition into national law had not yet passed, was nevertheless capable of indirect effect in the national legal order<sup>102</sup>. In the same way, it appears that the Charter has been used by national courts several times before gaining its legally binding status, as it was capable of indirect effect in the national legal order.

The second judgement of the Supreme Court to be discussed in the light of the above, is *Petar Sivev v Republic of Cyprus*, though the Attorney General and/or the Director of the Civil Registry and Migration Department<sup>103</sup>, delivered in 2008 within the Revisional Jurisdiction. In this case the applicant is a Yugoslavian national who was declared as a Prohibited Immigrant by the Attorney General and/or the Director of the Civil Registry and Migration Department. With the current recourse the applicant asked the Court three remedies, including a

“[s]tatement and/or decision of the Court that the decision of the respondent’s application prohibiting the applicant from entering the territory of the Republic of Cyprus where member of his core family is living, namely his wife, for family reunification, is invalid and/or contrary to human rights and fundamental freedoms as laid in the Cypriot Legislation, the European

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<sup>100</sup> S. LAULHE SHAELOU, “Back to reality: The implications of EU membership in the constitutional legal order of Cyprus”, in A. LAZOWSKI (ed.), *Brave new world: application of EU law in the new member states*, The Hague, T.M.C. Asser Press, 2010, pp. 480-481.

<sup>101</sup> Case n° 1012/2005, *Nebojsa Micovic v. Republic of Cyprus through the Director of Migration Services*, 18 November 2015.

<sup>102</sup> S. LAULHE SHAELOU, “Back to reality: The implications of EU membership in the constitutional legal order of Cyprus”, in A. LAZOWSKI (ed.), *Brave new world: application of EU law in the new member states*, The Hague, T.M.C. Asser Press, 2010, pp. 480-481.

<sup>103</sup> Case n° 51/2007, *Petar Sivev v. Republic of Cyprus, though the Attorney General and/or the Director of the Civil Registry and Migration Department*, 17 July 2008.

Convention of Human Rights, the Charter of Fundamental Rights of the European Union and in a number of other instruments of International Law”.

No other reference is made in the judgment in relation to the Charter and no explanation of its potential relevance to the case is given. Therefore, in the said case, even though the Charter is invoked by the applicant in 2008, before the Charter gaining formal legal status, it cannot be regarded as a purely substantial source of inspiration. The applicant only used it in a general way without invoking any specific Article and the judge did not make any further reference to it.

In relation to the cases before the courts of first instance, as shown on the table above, four references to the Charter were made in four different judgements prior to December 2009. However again, the reference is not necessarily made by the judges, but by the lawyers of the parties to the case, who use the Charter as a source of inspiration and assistance in their arguments. The first judgment before the courts of first instance is *Arhi Radiotileorasis Kyprou (Radiotelevision Authority Cyprus) v. Antenna Ltd*<sup>104</sup> with regard to an interim decision issued in 2008. In the current case the applicant had made an application for a summary judgment. The applicant suggested that the defendant owed them the amount of £5.400 as administrative fine and applied for a summary judgment in order to prevent them from filing a defence, asking from the Court the issue of a decision against the defendant. The respondent-defendant suggested that the collection of any amount from the applicants-plaintiffs would be contrary to Articles 47 and 48 EU Charter (they also invoked Articles 165-167 of the Constitution and Article 6 § 1 of the ECHR). The Court dismissed the application for a summary judgement stressing the importance of the right to defence in a trial. Although no further mention was made to the Charter by the judge, it can be argued that the stressing of the importance of the right to defence draws its inspiration from Article 47 and 48 of the Charter. The two following cases making reference to the Charter in 2008, before it became binding, consider the same parties again<sup>105</sup>. The facts of the cases are in the same line with the first case, differing in the amount of money, and the applicants invoked the exact same rights of the Charter for the exact same reason. The judges again dismissed the application for summary judgments in both situations.

The last reference to the Charter that may be regarded as using a purely substantial source of inspiration since it was held before the legally binding status of the Charter is yet another case opposing the same parties<sup>106</sup>. The difference in the facts, besides the amount the administrative fine, is the fact that the respondents did not specifically invoke provisions from the Charter but rather the rights included in the Charter in general. However, in this case the Court decided that the application for summary judgment was successful because

<sup>104</sup> *Arhi Radiotileorasis Kyprou (Radiotelevision Authority Cyprus) v. Antenna Ltd*, Case n° 9102/07, 15 February 2008.

<sup>105</sup> *Arhi Radiotileorasis Kyprou (Radiotelevision Authority Cyprus) v. Antenna Ltd*, Case n° 8192/07, 15 February 2008 and Case n° 135/08, 29 May 2008.

<sup>106</sup> *Arhi Radiotileorasis Kyprou (Radiotelevision Authority Cyprus) v. Antenna Ltd*, Case n° 2920/2009, 17 November 2009.

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the respondents did not show the existence of a good defence to the claim or to any part of it. The ruling failed to use the Charter as a substantial source of inspiration and no further stressing was made to the importance of human rights and the right to defence.

### II.3. The invocation of the Charter

#### *II.3.a. Invocation and request for preliminary ruling*

*Has the number of requests for a preliminary ruling by the ECJ increased due to the entry into force of the Charter? [Do not hesitate to provide statistical data]*

For several years no legal route for submitting a preliminary reference to the ECJ existed in Cyprus, when finally this *lacuna* in the law was resolved by the Courts (Amending) Law of 2007 (Law 99(I)/2007), where a subsection was added to Article 25 of the Courts Law (Law 14/1960). The effect of the amendment was that where a first instance court decides after request by one of the parties to submit or not to submit a preliminary reference to the ECJ, that decision of the lower court could be appealed before the Supreme Court, within 15 days.

A further amendment was nevertheless introduced in Cypriot legislation concerning preliminary references in 2008, by amending the Courts Law with Law 119 (I)/2008. The amended Law removed the possibility of appeal where the lower courts decide not to make a reference and thus, only provided for an appeal against decisions to submit a reference. The justification as well as the objective of this amendment were to avoid unnecessary delays, however causing the system to become even more rigid. It is noteworthy that only a minority of Member States (France, the United Kingdom, Denmark, Hungary and Portugal) have adopted such strict centralised systems for controlling the references to the ECJ and in those systems the appeal process is rarely and exceptionally used.

The last amendment made, in relation to the preliminary reference concerns Articles 25 (2A) and 34A of the Courts Law by amending Law 129(I)/2009. The right to appeal for all situations was removed, thus adopting in Cypriot legislation the system existing in a majority of EU Member States. This happened following the *Cartesio* case<sup>107</sup>. The procedural rules issued by the Supreme Court<sup>108</sup> still provide that the Registrar of the Court will not send a copy of the order to the ECJ until “(i) the time for appealing against the order has expired; or (ii) any application for permission to appeal has been refused”<sup>109</sup>. Notwithstanding the above, it can be argued that the legal framework, as amended, now offers the proper foundation for the effective engagement and participation of national courts in Cyprus to the evolution of EU law. The initial

<sup>107</sup> ECJ, Case C-210/06, *Cartesio*, ECLI:EU:C:2008:723.

<sup>108</sup> Preliminary Reference to the Court of Justice of the European Communities Rule of Court n° 1/2008.

<sup>109</sup> *Ibid*, Rule 4(c), which appears to be a reproduction of Rule 68(3) of the English CPR.

approach adopted under Cyprus law had created a wrong understanding about the operation of the preliminary reference procedure. The system could even have been in breach of the EU principle of effective judicial protection since access to the ECJ could be restricted through the process of appeal in Cyprus. In any case, it is clear from the case law of the ECJ that the admissibility of preliminary reference is examined, therefore rendering the national appeal process unnecessary and time-consuming<sup>110</sup>.

As previously examined, requests for preliminary rulings are also based on the Preliminary Reference to the Court of Justice of the European Communities Procedural Regulation (n° 1) of 2008, adopted by the Supreme Court on 6 March 2008, and providing for the basic general rules when referring a matter to the ECJ, to be followed by national courts. Under Article 3(a) of the said Regulation, a court shall issue a request for preliminary ruling at any stage of the proceedings either upon the request of a party or *ex officio*, after hearing the positions of the parties. Article 3(b) sets out further procedural details of preliminary references, including *inter alia* information to be provided as to the parties, the relevant provisions of national law and of EU law for which interpretation is required. Article 4 explains the procedure of transmission from the Cypriot courts to the ECJ while Article 5 makes clear that the case in question shall be suspended before the national court until the ECJ rules, unless the national court decides otherwise. As a general observation it can be said that courts in Cyprus consider the possibility of making a preliminary reference to the ECJ more frequently after the request of one of the parties to the case than on their own motion. Furthermore, it seems that in the majority of cases, courts decide against submitting a preliminary reference to the ECJ.

According to the Annual Report of the Court of Justice of the European Union, by the end of 2014, Cyprus had submitted *seven* references for preliminary ruling. The first two were submitted in 2009. In 2013 three more references were submitted and another two in 2014<sup>111</sup>. Out of the seven references for preliminary ruling submitted, four were submitted by the Supreme Court of Cyprus and three by other courts or tribunals. The number of references for preliminary ruling submitted by the Cypriot courts is one of the lowest in the EU (along with Malta), bearing in mind that Cyprus joined the European Union 2004<sup>112</sup>. Despite the low number of references, the four references submitted by the Supreme Court “appear to indicate a steady trend towards the progressive awareness and “mastering” of the preliminary reference mechanism by the

<sup>110</sup> C. LYCOURGOS, *Preliminary reference to the Court of Justice of the European Union – Law and practice in Cyprus ten years after accession to the EU*, March 2014, non-published study (on file with the authors). See also C. LYCOURGOS, “Building Intra-Judicial Dialogue: The Relationship between the ECJ and Cypriot National Courts”, *European Law Review*, 2016, (forthcoming).

<sup>111</sup> Court of Justice of the European Union Annual Report 2014 (Luxembourg 2015) p. 80.

<sup>112</sup> Croatia joined the EU in 2013 and submitted one reference. Malta and Slovenia joined the EU in 2004 and submitted one and nine references, respectively.

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Court”<sup>113</sup>. Despite the low number of preliminary references to the ECJ, there is nevertheless a good number of cases, either before the Supreme Court or the courts of first instance, where a preliminary reference can be observed, following the request of one of the parties, but usually not submitted to the ECJ by the national court, often acting without sufficient justification.

### II.3.a.i. Requests for preliminary rulings referred to the ECJ

The first reference from a Cypriot court was made by the Supreme Court on 27 November 2008 in the case of *Symvoulia Apochetefseon Lefkosias*<sup>114</sup>. The first reference was therefore made more than four and a half years after the accession of Cyprus to the EU, contrary to most other Member States who joined the Union in 2004 and made much earlier a relatively larger number of references, albeit with limited success.

In this case the applicant had requested a preliminary reference concerning the Award of Contracts (Supply, Works and Services) Law of 2003 which established the Tenders Review Authority. The said Law was implementing Directive 89/665/EEC<sup>115</sup>, and the issue in question was whether the decision of the Tenders Review Authority to annul the decision of the public authority to award a contract to a third party could be the subject of an action for annulment under Article 146 of the Constitution; in other words, whether the Tender Review Authority could be on the defending side of a filed recourse under Article 146 of the Constitution<sup>116</sup>. Judge Erotokritou held that the clarification of the relevant EU legal issues was essential for the Court to be able to decide the case in question. It was submitted that according to the case of *Rheinmühlen*<sup>117</sup>, even if the Supreme Court had examined the Directive in its 2007 decision, this would not have neutralised the discretion of the Court in the 2008 case to make a reference<sup>118</sup>.

The next reference submitted to the ECJ is the case of *Michalias*<sup>119</sup>, where a number of misconceptions the Supreme Court had at the time on the mechanism of preliminary ruling were revealed. In the framework of an appeal filed by Georgios Michalias, the Supreme Court decided to ask the ECJ whether Regulation (EC) n° 1347/2000 could be interpreted as granting jurisdiction to Cypriot courts for proceedings which were initiated before the accession of

<sup>113</sup> C. KOMBOS, S. LAULHE SHAELOU, “The Cypriot Constitution under the impact of EU law: an asymmetrical formation”, in A. ALBI (ed.), *The Role of national Constitution in European and global governance*, TMC Asser Press, 2016 (forthcoming).

<sup>114</sup> Case 629/2006, *Symvoulia Apochetefseon Lefkosias v. Anatheoritiki Archi Prosforon* (Tenders Review Authority) (2008).

<sup>115</sup> Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.

<sup>116</sup> C. KOMBOS, *The Impact of EU law on Cypriot Public Law*, Sakkoulas Publications, 2015, p. 157.

<sup>117</sup> Case 166/73, *Rheinmühlen* ECLI:EU:C:1974:3.

<sup>118</sup> S. LAULHE SHAELOU, “Back to reality: The implications of EU membership in the constitutional legal order of Cyprus”, in A. LAZOWSKI (ed.), *Brave new world: application of EU law in the new member states*, The Hague, T.M.C. Asser Press, 2010, pp. 486-487.

<sup>119</sup> *Georgios Michalias v. Christina Ioannou-Michalia* (n° 2) [2009] 1 CLR 908.



Cyprus to the EU. In a separate decision of the same day, the Supreme Court clarified that it believed that Regulation (EC) n° 1347/2000 was probably inapplicable, given that it could not have a retroactive effect. However, the Court felt obliged to refer the matter to the ECJ, for the reason that the interpretation on retroactivity would affect Community law. In the case before the ECJ<sup>120</sup>, the Court found the question submitted to “admit of no reasonable doubt” and answered it by reasoned order instead of a normal ruling. As to the substance, it held that indeed Regulation (EC) n° 1347/2000 could not be applied retroactively for the purpose of determining the jurisdiction of the courts of a Member State before the said State became a member of the Union. The case of *Michalias* constitutes an unfortunate example of the misconceptions by the Supreme Court as to the assessment of the preliminary reference procedure. The likelihood that the ECJ would declare the reference inadmissible was very high and it is remarkable that the ECJ did not do so. Therefore, it appears that on the one hand the Court shows great reluctance to refer to the ECJ, while on the other hand, it is driven in the opposite direction<sup>121</sup>.

In the recent cases of *Cypra Ltd*<sup>122</sup> and *Alpha Bank*<sup>123</sup> there are positive signs of carefully structured approaches by the Supreme Court and submitted to the ECJ, especially in *Alpha Bank*. In both cases, the Supreme Court followed a clear methodology to reach the conclusion that a reference is necessary<sup>124</sup>. The case of *Alpha Bank Ltd* concerned the validity of the service of documents in a number of civil cases that were joined by the Supreme Court. The Supreme Court came to the conclusion that questions for the interpretation of Regulation (EC) n° 1393/2007<sup>125</sup> were necessary in order for it to be able to decide those cases, and thus referred to the ECJ. The Supreme Court gave full consideration to the necessity and appropriateness of the reference, offered an exegesis for the obligation to make a reference and briefly excluded the applicability of the *acte clair* doctrine<sup>126</sup>. It was also stated that the issue was not as obvious as to remove the element of doubt. At the time of writing, the case is still pending before the ECJ. It is to be hoped that this approach will be followed by other courts when making references in the future.

<sup>120</sup> ECJ, Case C-312/09, *Michalias* ECLI:EU:C:2010:357.

<sup>121</sup> For a detailed analysis of the case, C. LYCOURGOS, *Preliminary reference to the Court of Justice of the European Union – Law and practice in Cyprus ten years after accession to the EU*, March 2014, non-published study (on file with the authors). See also C. LYCOURGOS, “Building Intra-Judicial Dialogue: The Relationship between the ECJ and Cypriot National Courts”, *European Law Review*, 2016 (forthcoming).

<sup>122</sup> *Cypra Ltd v. The Republic* [2013] 3 CLR 205.

<sup>123</sup> Joint Appeals n° 23-29/2013, *Alpha Bank Cyprus v. Si Senh Dau and others*, 13 September 2013.

<sup>124</sup> For a detailed analysis of the case, C. LYCOURGOS, *Preliminary reference to the Court of Justice of the European Union – Law and practice in Cyprus ten years after accession to the EU*, March 2014, non-published study (on file with the authors). See also C. LYCOURGOS, “Building Intra-Judicial Dialogue: The Relationship between the ECJ and Cypriot National Courts”, *European Law Review*, 2016 (forthcoming).

<sup>125</sup> Regulation (EC) n° 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) n° 1348/2000.

<sup>126</sup> C. KOMBOS, *The Impact of EU law on Cypriot Public Law*, Sakkoulas Publications, 2015, p. 165.

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The next important case to examine where a preliminary reference was submitted is the case of *Papasavva*<sup>127</sup>, where the District Court of Nicosia submitted a preliminary reference. Mr Papasavvas brought an action for damages before the District Court against a news report company, for harm arguably caused to him by articles published. The news report company requested to submit five questions to the ECJ and the District Court concluded that it was necessary to clarify whether and to what degree Directive 2000/31/EC<sup>128</sup>, applied in cases of online defamation. In *Papasavvas* the plaintiff in the main proceedings sought leave from the Supreme Court to file an application for an order of *Certiorari*. The Supreme Court in its decision by Judge Hadjihambis concluded that the conditions for granting such leave were not satisfied, given that the applicant had not shown that there had been an obvious error of law on behalf of the District Court and also stated that an order of *certiorari* is probably not an adequate instrument for controlling the reference of questions to the ECJ made by first instance courts. The Supreme Court, thus, dismissed the argument that the District Court, through the questions that it referred to the ECJ, committed an obvious error of law by formulating a request for a preliminary reference. The ECJ responded<sup>129</sup> and confirmed *inter alia*, that the said Directive covers the provision of online information services for which the service provided is remunerated. It is argued that the preliminary ruling in *Papasavvas*, although submitted by a District Court, was carefully structured while the questions were raised in a detailed manner<sup>130</sup>.

Overall, it can be said that there has been a radical and positive change of the approach taken by the courts in Cyprus towards preliminary references. While it appears that earlier cases showed a number of misconception in the courts' approach to preliminary references as well as their use of the mechanism, recent cases certainly show positive signs of encouragement towards referring to the ECJ, through a very clear and careful methodology. None of these references appears however to raise issues of validity of EU legal acts, neither the remainder of the submitted preliminary references to the ECJ<sup>131</sup>. A final note to be made is that there have not been any preliminary references regarding the Charter submitted yet, even if a good number of such requests has been made before the national courts.

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<sup>127</sup> Case n° 9493/10, *Sotiri (Aki) Papasavva v. Fileleftheros Public Company Ltd, Taki Kounnafi and Giorgou Serti*, 27 March 2013.

<sup>128</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

<sup>129</sup> ECJ, Case C-291/13, *Papasavvas*, ECLI:EU:C:2014:2209.

<sup>130</sup> For a detailed analysis of the case, C. LYCOURGOS, *Preliminary reference to the Court of Justice of the European Union – Law and practice in Cyprus ten years after accession to the EU*, March 2014, non-published study (on file with the authors). See also C. LYCOURGOS, "Building Intra-Judicial Dialogue: The Relationship between the ECJ and Cypriot National Courts", *European Law Review*, 2016 (forthcoming).

<sup>131</sup> See C. KOMBOS, S. LAULHE SHAELOU, "The Cypriot Constitution under the impact of EU law: an asymmetrical formation", in A. ALBI (ed.), *The Role of national Constitution in European and global governance*, TMC Asser Press, 2016 (forthcoming), section 2.8.

### II.3.a.ii. Unsuccessful requests for preliminary ruling not referred to the ECJ

There has been a number of requests for preliminary reference to the ECJ not eventually submitted, sometimes arguably wrongly so. The first case to examine is *Motilla*<sup>132</sup>, which is probably the most striking example where the Supreme Court arguably had an obligation to refer the matter to the ECJ but nevertheless chose not to do so. The case concerned a Filipino national who had been residing legally in Cyprus for more than five years when she applied for long-term residence status under Law N. 8(1)/2007, implementing into Cypriot law Directive 2003/109/EC<sup>133</sup>. The Supreme Court interpreted the provision in question without referring the matter to the ECJ. With a majority of nine to four, the Court engaged in a detailed discussion about the terms of the relevant Directive, with a clear disagreement as to its proper interpretation and reached the conclusion that the Directive was not applicable for Ms Motilla's case. It is however difficult to justify the Supreme Court's decision in this case since there was clearly doubt as to the proper interpretation to follow, including within the Supreme Court itself. The dissenting judges did not suggest either that the matter should have been referred to the ECJ in their own judgment<sup>134</sup>.

Another interesting case is the decision in *Marios Odysseos*<sup>135</sup>, where the issue was whether the accused had violated Article 4 of the Law 32 (I)/96 on Illegal Gaming Machines. The accused requested the Court for a preliminary reference to the ECJ, to consider whether Article 4 is compatible with the European *acquis* and in particular Articles 34, 36, 49 and 56 TFEU, given that according to the Fifth Amendment of the Constitution, the European *acquis* prevails over national law and the Constitution. The District Court of Nicosia dismissed the request and stated that such a preliminary reference is not justified. However, the District Court made a useful analysis of the nature of the preliminary reference procedure, which was arguably detailed, accurate and extensive.

### II.3.a.iii. Unsuccessful requests for preliminary ruling concerning the Charter

After having examined the approaches adopted by Cypriot courts in most of the requests for preliminary ruling submitted or not, it is necessary to examine any requests regarding the Charter more specifically. Since the entry into force of the Lisbon Treaty and the legally binding nature of the Charter, there has been a number of requests for submission of preliminary references to the ECJ, which

<sup>132</sup> *Cresencia Cabotaje Motilla v. the Republic* (2008) 3 CLR 29.

<sup>133</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

<sup>134</sup> S. LAULHE SHAELOU, "Back to reality: The implications of EU membership in the constitutional legal order of Cyprus", in A. LAZOWSKI (ed.), *Brave new world: application of EU law in the new member states*, The Hague, T.M.C. Asser Press, 2010, pp. 481-484.

<sup>135</sup> Criminal case 17848/2007, *Director of Nicosia Police v. Marios Odysseos and others*, 28 June 2010.

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would otherwise not have been made. However, at the time of writing none of these requests has been submitted to the ECJ.

The first case to examine is *Pembe Refet*<sup>136</sup>, where a request for submitting a preliminary ruling was made by the applicants before the District Court of Larnaca. The applicant, a Turkish-Cypriot, sold land to an English company, Seacrest Properties Ltd (the applicant for the joint case), which was allegedly hindered to be transferred, infringing her right to property, established both under the Charter and the ECHR. Based on the request of the applicants, preliminary questions had been formulated, firstly “whether it constituted discrimination within the meaning of Directive 2004/38/EC<sup>137</sup> and Article 21 of the Charter, when the property owner needs the approval of the Minister of Interior to sell real estate because she is of Turkish Cypriot origin” and secondly,

“whether it is a violation of the right to property under Article 17 of the Charter when the property owner is prevented by the Minister of Interior to enjoy the right of property in the absence of the conditions referred to in Article 17 itself, simply by claiming that the situation is unsettled”<sup>138</sup>.

Their request was based on Article 267 TFEU, the Citizenship Right Directive, Articles 17 and 21 of the Charter, Article 34A of the Court Law 14/60 and on the Civil Procedure Rules. The Court stated that given the different interpretation given by the defendant to the said instruments by invoking exclusively the Law on Turkish Cypriot Properties (Administration and other matters) 1991, it was in the interest of justice and of ensuring the necessity of a single and uniform interpretation and application of European law, to accept the request and send the questions. However, the District Court of Larnaca dismissed the request on the ground that the facts of the case were not clear enough and that the submission of a preliminary reference to the ECJ in this case would be unnecessary and inconsistent.

In the Joint Revisional Appeals 42/2013, 43/2013, 44/2013 and 45/2013 of *Kristian Bekefi*<sup>139</sup>, another request for a preliminary reference was made. Appeals were brought by the applicants, asking the Court to review the judgment of the first instance court on the issue of infringement of the presumption of innocence and of Article 29 of the disputed Law. However, pending the proceedings, the applicants brought the current application requesting a preliminary reference to the ECJ for two questions.

“[Firstly,] whether Articles 27 and 28 of Directive 2004/38/EC in conjunction with Article 48 of the Charter, enshrining the presumption of innocence, are interpreted in a way so as to allow the deportation of a person

<sup>136</sup> Joint cases n° 3158/10 and 3612/10, *Pembe Refet v. Attorney General and the Guardian of Turkish Cypriot service*, 30 April 2014.

<sup>137</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

<sup>138</sup> *Ibid.*

<sup>139</sup> Revisional Appeals n° 42-45/2013, *Kristian Bekefi and Gerasimos Kapsaskis and Iliev Pavel and Angelov Kalin Stavov v. Cypriot Republic*, through the Ministry of Interior, 8 September 2015.

on grounds of public policy or public security based on information of the administration stating that the deported person operates illegally, but without holding any official complaint on the alleged illegal operations and based on accusation that...were suspended by the administration...”.

“[Secondly,] whether Articles 27, 28 and 31 of Directive 2004/38/EC in conjunction with Articles 45, 52 and 21 paragraph 2 of the Charter, are interpreted in a way to allow the deportation of a person for reasons of public policy or public safety based on the information of the administration stating that the deported person operates illegally, but without the existence of a conviction...”.

The Supreme Court within its second instance jurisdiction, considered national case law on the issue and examined the freedom of movement of Union citizens. The Supreme Court, *inter alia*, invoked the principle of *acte claire* and dismissed the request for preliminary reference to the ECJ, stating that the conditions for such a reference were not satisfied.

In the case of *Thomas Kaoulla and Eleni Kaoulla*<sup>140</sup>, a preliminary reference was requested in relation to the interpretation of the Charter. The applicants requested *inter alia* to submit a question regarding the equality in tax schemes of refugee and non-refugee citizens of the Republic of Cyprus. This request for a preliminary reference was part of the grounds for appeal, challenging the decision of the first instance court. The Supreme Court indicated that the appellant cannot invoke, before the Court of Appeal, issues that were not invoked and were not disputed before the Court of First Instance. Therefore, since no issues of violations of rights stemming from European Law, including the Charter, were raised in the first instance decision, they could not be raised for the first time at the appeal stage. The Supreme Court concluded that for the reasons stated, a possible preliminary reference would just be an “academic exercise” and that this was not the purpose of the question for reference. It further added that “in any case, the notions of Articles 20 and 21 of the Charter are largely identical with the corresponding notions of the Constitution [of Cyprus], which have been fully clarified by the Cypriot case law and therefore there would be no reason for a preliminary reference, even if the issue could be raised on appeal”<sup>141</sup>.

As a general conclusion, it could be said that the number of requests for preliminary ruling by the ECJ has increased due to the entry into force of the Charter. Parties to the cases now require specific guidelines on the application of the various provisions of the Charter. It remains however that despite the increasing number of requests for preliminary rulings by parties, the national courts appear reluctant to submit them. There is a last category of requests for

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<sup>140</sup> Civil Appeal n° 77/2012, *Thomas Kaoulla and Eleni Kaoulla v. The Republic, through the Attorney General*, 13 February 2013.

<sup>141</sup> *Ibid.*

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preliminary references to be examined, where the Charter is used as a legal basis but does not form part of the questions to be submitted.

### II.3.a.iv. Request for preliminary rulings referring to the Charter as a legal basis but not as part of the questions

In *Synergatiki Pistotiki Eteria Imiorinis Lemesoy*<sup>142</sup>, a preliminary ruling was requested by the applicant on 22 October 2014. The issues that had to be referred to the ECJ, according to the applicant, were three questions on the interpretation and application of Directive 93/13/ECC<sup>143</sup>, regarding the assessment of invalidity and/or unfair nature of an arbitration decision. Part of the question was

“whether Directive 93/13/ECC on unfair terms in consumer contracts, has the meaning that a national court hearing an application for entry and execution of arbitration decision, which was not appealed within the prescribed period of 21 days, to make an assessment of invalidity and/or abusive clause, of exclusive affiliation to arbitration contained in a contract law as part of this process...”<sup>144</sup>.

The District Court of Limassol issued its decision in April 2015, dismissing the request, since it did not consider the preliminary ruling necessary in order to issue its own decision in the primary application, as required for a preliminary ruling request to the ECJ. However, what is interesting in this application is the use of the Charter as a legal basis for the request for preliminary ruling. Namely, the applicant stated that besides Article 267 TFEU, the Cypriot Constitution, Article 34A of the Courts Law, provisions of Civil Procedure Rules and the Regulations on the Preliminary Reference to the Court of European Communities, Articles 20, 21, 47, 52, 53, 54 of the Charter were also used as a legal basis for the reference.

This would tend to show that lawyers do not appear to be familiar enough with the mechanisms of the Charter and occasionally use it unsystematically and immethodically, merely in order to “boost” their applications before the Court.

### II.3.b. Modalities of invocation

#### II.3.b.i. Is the Charter invoked on its own or is it combined with other EU law provisions, national law or the ECHR? Is there a trend to a combination or an autonomization of legal provisions?

In the vast majority of the judgments before the Cypriot courts (Supreme Court and lower courts) making references to the Charter, the invocation of fundamental rights provisions is combined with an invocation of rights and principles under the Cypriot Constitution and/or rights and principles under the ECHR and its Protocols. There are also judgments that invoked provisions of other international law instruments as ratified by the Cypriot Parliament, such as

<sup>142</sup> Case n° 240/13, *Synergatiki Pistotiki Eteria Imiorinis Lemesoy v. Fani Michalis and Chrysostomoy Athos*, 27 April 2015.

<sup>143</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

<sup>144</sup> Case n° 240/13, *Synergatiki Pistotiki Eteria Imiorinis Lemesoy v. Fani Michalis and Chrysostomoy Athos*, request for preliminary ruling, 22 October 2014.

the UN International Covenant on Civil and Political Rights, the UN International Covenant on Economic, Social and Cultural Rights, the European Social Charter etc.

According to our empirical research the legal provision mostly invoked by the parties before the Supreme Court is Article 47 of the Charter, with a count of ten invocations within the Revisional Jurisdiction, once within the Second Instance Jurisdiction and another three times within the First Instance Jurisdiction of the Supreme Court. Article 47 is usually combined and invoked together with the Citizenship Right Directive or Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status. Moreover, Article 47 was also combined with Articles 3 and 13 ECHR in various cases. Another more frequent trend is the invocation of Article 9 of the Charter before the Supreme Court within its first instance jurisdiction. This provision was invoked 13 times by the parties before the Supreme Court within its first instance jurisdiction, commonly combined with Directive 2005/85/EC, and once within its revisional jurisdiction, combined with Article 7.

The next fundamental rights and freedoms to be invoked by the parties are Articles 20 and 21 of the EU Charter, three times in total before the Supreme Court (two invocations within its revisional jurisdiction and one within its second instance jurisdiction), Article 17 (two invocations within the revisional jurisdiction and two within the first instance jurisdiction) and Article 15 (one invocation within the revisional jurisdiction and two within the first instance jurisdiction). Articles 45 and 52 combined as well as Articles 7, 19, 14, 15, and 16 are also invoked.

The last important observation to be made in relation to the Charter is that while invoked by the parties in 12 different judgments (eight within the revisional jurisdiction, one within the second instance jurisdiction and three within the first instance jurisdiction), it was done in general terms and without any specific reference to a right or principle. Even though this trend appears more frequent in the pre-2009 judgments, it is still used by lawyers but not accepted by the courts since such an invocation cannot be legally supported.

**II.3.b.ii. If the Charter is not invoked by the parties, does the judge proceed to an examination of its provisions on his own motion?**

As mentioned in other sections above, in the vast majority of the judgments of Cypriot courts making reference to the Charter, the invocation of the fundamental rights is made by one of the parties to the case. Judges both at the Supreme Court and in lower courts seem reluctant to proceed with the examination of fundamental rights provisions under the Charter on their own motion.

According to our empirical research there are only eight judgments out of the 65 before the Supreme Court where the judge seem to proceed with an examination of the provisions of the Charter on their own motion or by extensively using a reference already made by one of the parties (Section II.2.a). Moreover, three out of the 65 corresponding judgments were traced before the Courts of First Instance. It is thus an infrequent situation and some explanations for this phenomenon could

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be advanced. The prime factor is the nature of the Constitution of Cyprus. As explained above, the Constitution of Cyprus includes a long list of rights (Articles 6-35) which clearly correspond to the rights established under the ECHR and even beyond. Therefore, the Constitution offers a clear and extensive protection to the rights included therein and at the same time imposes the restrictions necessary for safeguarding the substantive access to these rights.

Therefore, the strong links of human rights protection with the Constitution could appear to be the main reason why judges do not proceed with the examination of the provisions of the Charter. Moreover, there are long-established case law and precedents in Cyprus protecting virtually every right mentioned in the Constitution, and even a longer-established case law on the Convention referred to by national courts for a long time now. Thus, these reasons would seem to “render” the Charter a “needless” legal instrument for protecting human rights in Cyprus, according to our empirical research and the stance of national judges.

The second possible explanation could be the fact that the Cyprus legal system is an adversarial system based on English common law. In an adversarial system, in contrast to the inquisitorial system or investigative system, parties plead their case towards the judge who has the role of deciding based on the evidences put forward to him/her. It is the system followed in the common law countries and the judges are not allowed to investigate the case on their own motion (only in very exceptional situations such as the questioning of witnesses in criminal cases). Therefore, based on this concept, the judge is not obliged to invoke or proceed with the examination of the provisions of the Charter should the lawyers not do so in their pleadings. This phenomenon is aggravated by the fact that lawyers are not overall familiar enough with the mechanisms of the Charter and its systematic application. Consequently, the lack of reference to the Charter appears like a vicious circle, where judges are not willing to invoke the provisions of the Charter on their own motion due to the adversarial system while lawyers are not sufficiently familiar with the Charter to be able to apply it; hence judicial guidance seems to be required.

Another reason that leads the parties to the case as well as judges to avoid the invocation of the provisions of the Charter is the application of the Charter only when “implementing Union law”, deriving from Article 51 EU Charter. The limited scope of application of the Charter could appear to restrict its use by national courts to a great extent. According to our empirical research which also outlines the use of Article 51, national judges appear to not “bother” examining whether the disputed legal provisions can be regarded as implementing Union law, but rather prefer the “safe harbour” of invoking the provisions of the Convention which have a broader scope of application, should there be an alleged violation of fundamental rights.

The lack of invocation of the provisions of the Charter could also be attributed to the existence of other instruments of EU law providing for the protection of fundamental rights, either identical to the Charter or more specific than the



provisions of the Charter<sup>145</sup>. Such instruments, of secondary legislation by nature, would not however have force of primary law like the Charter, which means that they are subject to the principles of direct applicability and direct effect as requirements for their enforcement before the national courts.

Finally and by way of epilogue, it seems that even though the Charter can be directly applied and used by national judges, there appears to be reluctance to do so without the corresponding implementing mechanisms of the provisions of the Charter being set out in clear terms. Therefore, as discussed above, it would appear that the absence of implementing mechanisms of the Charter into Cypriot law affects the efficiency of referring to the Charter before and by the national courts. In full respect of the principle of the separation of powers, the House of Representatives could perhaps consider generating implementing mechanisms of the Charter, such as the very recent one implementing the third paragraph of Article 47 into Cypriot legislation.

By way of conclusion to this questionnaire, it appears that the answers to the vast majority of the questions of the questionnaire from the Cypriot perspective have a certain degree of theory by nature, given the lack of effective discussion of the EU Charter before the national courts, also reflected in legislation. It has however been demonstrated throughout the analysis in this Report that there have been more recently some encouraging steps, both by the national courts and the House of Representatives, towards the development of judicial and legislative awareness in relation to EU fundamental rights protection under the Charter at the national level.

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<sup>145</sup> This can be seen in Case n° 12/10, *Charis Christodoulidou v. Republic of Cyprus through the Public Service Committee*, 3 April 2015, mentioned above.

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# Cahiers Européens

Le lancement de la collection des « Cahiers européens » en 2011 – avec comme premier numéro *L'identité constitutionnelle saisie par les juges en Europe* – avait le souci, de réintégrer la part du « national » dans l'étude du droit de l'Union. Non pas que cette approche entende tomber dans un cloisonnement réducteur, en étant exclusive de toute autre manière de penser de façon critique le fait européen, mais elle entend simplement faire en sorte que le champ national – en ce qu'il fait partie intégrante du champ européen – ne soit pas ignoré des études européennes. Le dixième numéro de la collection des « Cahiers européens » arrive, ce faisant, à point nommé. L'ouvrage sur *La Charte des droits fondamentaux saisie par les juges en Europe* est le fruit de près de trois ans de recherche collective menée avec des chercheurs et collègues issus de vingt-deux pays membres de l'Union; il a été conçu sur la base de l'élaboration d'une grille d'analyse imaginée afin d'appréhender toutes les phases et les manières selon lesquelles la Charte des droits fondamentaux a pu être « saisie » par les différents acteurs nationaux ; il s'est agi de prendre la mesure, précise, du degré d'effectivité de ce texte dont on sait qu'il a été pensé et rédigé afin d'incarner et de rendre visible les valeurs de l'Union.

The launch of the collection « *Cahiers européens* » in 2011 – with its first number on *The constitutional identity as apprehended by judges in Europe* – was intended to reintegrate the “national” aspect to the research of the Union. This approach is not aimed to strengthen even more the disciplinary boundaries, which would exclude any other ways of critically analysing the European integration, but it is intended to ensure that the national agenda, constituting integral part of the European agenda, is not ignored in the European studies. The tenth number of the collection « *Cahiers européens* » appears just at the right time. The book on the *Charter of Fundamental Rights as apprehended by judges in Europe* is the result of almost three years of collective research; it has been conducted with researchers and colleagues from twenty-two member States of the European Union and it was elaborated on the basis of an analytical framework to assess all the phases and means in which the Charter of Fundamental Rights could be « apprehended » by different national stakeholders; the research aimed to measure to what extent the Charter is effective, while bearing in mind that the instrument has been conceived and drafted in order to enshrine and make visible the European Union's values.

L'ouvrage réunit des analyses sur l'Allemagne (EVELYNE LAGRANGE, ANNE-MARIE THEVENOT-WERNER), l'Autriche (JANE HOFBAUER, CHRISTINA BINDER); la Belgique (PIERRE-VINCENT ASTRESSES), la Bulgarie (MARTIN BELOV, MARIA FARTUNOVA), Chypre (STÉPHANIE LAULHE SHAELOU, KATERINA KALAITZAKI), le Danemark (JONAS CHRISTOFFERSEN, MIKAEL RASK MADSEN), l'Espagne (AUGUSTO AGUILAR CALAHORRO, STÉPHANE PINON), la Finlande (TUOMAS OJANEN), la France (EDOUARD DUBOUT, PERRINE SIMON, LAMPRIINI XENOU), le Grand Duché de Luxembourg (VÉRONIQUE BRUCK), la Grèce (COSTAS STRAVILATIS, CHRISTOS PAPASTYLIANOS), la Hongrie (ANTAL BERKES), l'Irlande (BRICE DICKSON), l'Italie (EDOARDO STOPPIONI), Malte (ARNAUD LOBRY), la République Tchèque (MAGDALENA LICKOVA), la Pologne (NINA POLTORAK), le Portugal (NATALIA LEITE), la Roumanie (DRAGOS-ALIN CĂLIN, CONSTANTIN MIHAI BANU, DANIEL-MIHAIL SANDRU), la Slovénie (SAMO BARDUTZKY, MARTINA GREIF, ŽIVA NENDL, BRUNO NIKOLIĆ, SANDRA PAVLIC, ZORAN SKUBIC), la Suède (VALÈRE NDIOR), le Royaume-Uni (BRICE DICKSON). Le rapport sur la jurisprudence de la Cour de Justice a été élaboré par FRANÇOIS-XAVIER MILLET, tandis que le rapport de synthèse le fut par LAURENCE BURGORGUE-LARSEN.

